FILE COPY

FILED

FEB 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-899

BAXTER K. WILLIAMS, ET AL., *Appellees Below,*

v.

THE ALBEMARLE CITY BOARD OF EDUCATION,
Appellant Below.

JOSEPH P. MOODY, ET AL., *Appellants Below,*

v.

ALBEMARLE PAPER COMPANY, ET AL., *Appellees Below.*

On Certification of a Question From the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE ALBEMARLE CITY BOARD OF EDUCATION

RICHARD LANE BROWN III
Corner Main and Second Streets
Albemarle, North Carolina 28001
Attorney for Appellant Below.

Of Counsel:

RICHARD L. BROWN, JR.
CHARLES P. BROWN
Corner Main and Second Streets
Albemarle, North Carolina 28001

MARTIN B. LOUIS
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	3
Summary of Argument	4
Argument	6
I. This Court Should Decline To Answer the Question Certified	6
A. Although The Question Certified Appears To Be In Proper Form, This Court May Decline To Answer It If No Significant Purpose Would Be Served By Expediting Its Resolution	6
B. No Significant Purpose Will Be Served By Expediting The Resolution Of The Question Certified	9
II. If the Question Certified Is Answered, It Should Be Answered in the Affirmative	11
Conclusion	[illegible]

CITATIONS

Cases:

Allen v. Johnson, 391 F. 2d 527 (6th Cir.)	19, 20
Baldlle v. Lavrisch, 266 U.S. 173	7
Busby v. Electric Utilities Union, 323 U.S. 72	7
Columbus Watch Co. v. Robbins, 148 U.S. 266	13
Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 294 F. 2d 289 (2d Cir.), aff'd, 370 U.S. 254	8

Page

Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341 21
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 11
Middletown Nat. Bank v. Toledo, 197 U.S. 394 13
Perkins v. Standard Oil Co. of California, 395 U.S. 642 21
St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U.S. 226 21
Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 8
United Mine Workers v. Gibbs, 383 U.S. 715 21
United States v. American Foreign Steamship Corp., 363 U.S. 685 11
United States v. Barnett, 346 U.S. 681 10
United States v. Woo Jan, 245 U.S. 552 13
Wheeler Lumber Bridge & Supply Co. v. United States, 281 U.S. 572 7
Wisniewski v. United States, 353 U.S. 901 7, 10
Zahn v. International Paper Company, 469 F.2d 1033 (2d Cir.) 19

Rules and Statutes

Act of 1891, 26 Stat. 826, § 2 8
Act of June 25, 1948, c. 646, 62 Stat. 871, as amended, 28 U.S.C. § 46 2
Act of Nov. 13, 1963, P.L. 88-176, 77 Stat. 331, 28 U.S.C. § 46(c) 3, 11, 16, 18
Federal Rules of Appellate Procedure
Rule 35(a) 2
Rule 35(b) 3, 16, 18

Congressional Material

21 Cong. Rec. 10222 (1890) 8
1963 U.S.C. Cong. & Ad. News 12

Miscellaneous

1969 Ann. Rep. of the Judicial Conference 12
Hart and Sacks, *The Legal Process* (Tent. Ed. 1958) 15, 21
Moore and Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 Va. L. Rev. 1 (1949) 8
Wright, Federal Courts § 106 (2d ed. 1970) 6, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-899

BAXTER K. WILLIAMS, ET AL., *Appellees Below,*

v.

THE ALBEMARLE CITY BOARD OF EDUCATION, *Appellant Below.*

JOSEPH P. MOODY, ET AL., *Appellants Below,*

v.

ALBEMARLE PAPER COMPANY, ET AL., *Appellees Below.*

On Certification of a Question From the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE ALBEMARLE CITY BOARD OF EDUCATION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court granting plaintiffs relief is unreported. A per curiam opinion of the United States Court of Appeals for the Fourth Circuit, affirming in part, vacating in part and remanding, has been issued,

but is unreported and will not become final until disposition of the question certified. Neither the findings of fact, conclusions of law, and order of the district court, nor the opinion of the court of appeals deal with the question certified.

JURISDICTION

On December 6, 1973, the United States Court of Appeals for the Fourth Circuit certified a question to this Court pursuant to 28 U.S.C. § 1254(3). On January 14, 1974, this Court issued an order granting and inviting the parties to file briefs on or before February 13, 1974, in response to the question certified.

STATUTES INVOLVED

This case involves 28 U.S.C. § 46, which provides, in relevant part, as follows:

> (c) Cases and controversies shall be heard and determined by a court of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the judges of the circuit who are then in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

The case also involves Rule 35 of the Federal Rules of Appellate Procedure, which provides in part:

> (a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard

by the Court of Appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

QUESTIONS PRESENTED

Whether the United States Supreme Court should answer a question certified by a court of appeals because of a difference of opinion among the circuits, instead of awaiting a petition for certiorari, in a case in which proceedings in the court of appeals have effectively been completed.

Whether under 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure, a senior circuit judge, a member of the initial hearing panel, may vote in the determination of the question of whether the case should be heard *en banc*.

STATEMENT

This case involves a claim for alleged employment discrimination under 42 U.S.C. § 1983, arising out of the desegregation of a public school system. The trial court found discrimination and awarded plaintiff,

inter alia, back pay. A panel of the United States Court of Appeals for the Fourth Circuit, which included one senior circuit judge, affirmed the finding of discrimination but vacated the back pay award. Upon a suggestion for a rehearing *en banc*, a vote of the court was held and the suggestion was defeated by an equal division of the judges of the court, including the senior circuit judge, who voted against the rehearing.

On December 6, 1973, the Court of Appeals for the Fourth Circuit certified the following question to this Court:

> Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be heard *en banc*?

Although the answer to the question certified may affect the outcome of the case in the court of appeals, the question itself does not touch on the facts or the merits of the case.

SUMMARY OF ARGUMENT

I

The certification jurisdiction is rarely invoked today because of this Court's traditional resistance to it. The source of this resistance is threefold: (1) a certified question is like a hypothetical question or an advisory opinion, (2) the proceeding is, in effect, an interlocutory appeal permitting piecemeal adjudication, and (3) the jurisdiction is otherwise mandatory and beyond this Court's control. For these reasons, the question certified must be appropriate in form and nature, and, in addition, will be answered only in "rare

instances" involving "exceptional" circumstances. This is not such a case. The Court of Appeals for the Fourth Circuit is divided on questions involving the merits, not on the question certified. Thus, if the question were answered, petitions for certiorari seeking resolution of these other questions would probably be filed immediately. Furthermore, the court of appeals has virtually completed its efforts and will not be spared further futile proceedings, the validity of which are threatened by the question's presence.

Although the question certified has divided the courts of appeals, that is an appropriate circumstance for certiorari, by means of which this Court alone may decide whether the question is of sufficient importance to be resolved now. Finally, although the question does involve the powers and duties of judges, it assumes determinative importance only rarely and involves powers and duties the exercise of which are hardly ominous. Thus there is no crisis in judicial administration here warranting a mandatory, piecemeal review, rather than a normal petition for certiorari.

II

In 1969, it was held that a retired circuit court judge who had participated in the initial hearing of a case could not participate in its rehearing *en banc*. Shortly thereafter the provisions of the judicial code were amended to overturn this unwanted result. In the process, however, no explicit consideration was given to the question of whether this judge could also participate in the vote to order a rehearing, an act now seemingly barred by the literal words of those provisions of the judicial code that were essentially unchanged and had effected the prior unwanted result.

The legislative history and text of the amending act reveal no such purpose, however, and specifically list certain other duties that the retired circuit judge was not to perform. Furthermore, there is no apparent reason or policy that would induce Congress to form such a purpose. In fact, because a retired circuit judge who is a member of the initial hearing panel may clearly participate in the rehearing, as well as in the process of deciding whether a suggestion for a rehearing *en banc* will be put to a vote of the court, his exclusion from the intervening ordering vote would be inconsistent, to say the least. Consequently, the statutory language granting him the greater power to vote at the rehearing *en banc* should be construed to include the lesser, ancillary power to vote on whether the rehearing will be ordered. Such a construction, the merits of which have never been challenged by any substantial body of legislative or judicial opinion, is a reasonable interpretation of a statute which was designed to settle the retired judge problem and which specifically listed the duties which such judges were not to perform.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ANSWER THE QUESTION CERTIFIED.

A. Although The Question Certified Appears To Be In Proper Form, This Court May Decline To Answer It If No Significant Purpose Would Be Served By Expediting Its Resolution.

The certification jurisdiction at issue here, which is set forth in 28 U.S.C. § 1254(c), appears to be couched in mandatory terms. Nevertheless, this Court has so frequently declined to answer questions certified to it that it has in effect rendered the grant discretionary. C. Wright, *Federal Courts* § 106 (2d Ed. 1970); J.

Moore and A. Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 Va. L. Rev. 1, 22 (1949). Admittedly, many certified questions have not been answered because they were inappropriate in form or nature, problems apparently not present here. Other questions evidencing no such defects, however, have also not been answered. *Wisniewski v. United States*, 353 U.S. 901 (1957); *Rushen v. Electric Utilities Union*, 323 U.S. 72 (1944). In explanation of these refusals, the Court has stated that this jurisdiction is "exceptional," *Wisniewski v. United States*, *supra* at 902; *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576 (1930), and that the question certified must be "substantial," as well as proper in form and nature. *Biddle v. Lurisch*, 266 U.S. 173, 175 (1924). Indeed, these statements, coupled with the Court's manifest reluctance over the years to entertain such questions and the attendant reluctance of the courts of appeals to submit them, suggests that a question will not be answered unless some significant purpose will be served by expediting its resolution in this manner. Thus in *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (emphasis added) the Court said:

> It is also the task of a Court of Appeals to decide all properly presented cases coming before it, *except in the rare instances*, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and *expedition* of judicial business.

Limiting the certification jurisdiction to "rare instances" is appropriate and of increasing validity today. Originally the jurisdiction was needed to circumvent a difference of opinion in a two judge circuit

court that was thereby unable to reach decision and render an appealable order or judgment. J. Moore & A. Vestal, "Present and Potential Role of Certification in Federal Appellate Procedure," 35 Va. L. Rev. 1, 10-11 (1949). That problem was obviated by the Act of 1891, 26 Stat. 826 et seq., § 2 (1891), which stripped the circuit courts of the power to certify questions to the Supreme Court, created the circuit courts of appeals, and transferred this power to them in terms that are essentially unaltered today. Although Senator Evarts, the bill's sponsor in the Senate, viewed the certification power as a useful device to settle differences of opinion within each circuit court of appeals and among the different circuit courts of appeals, Remarks of Senator Evarts, 21 Cong. Rec. 10222 (1890), these functions have largely been assumed over the years by other jurisdictional grants. Thus certiorari has become the principal access route to this Court for the settlement of inter-circuit differences; and the *en banc* hearing has become the principal device for the settlement of intra-court disputes. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 335 (1941). Even the equal division of the judges of a court of appeals in an *en banc* hearing does not require the assistance of the certification power, since the judgment of the trial court, as affirmed by an equally divided court of appeals, is reviewable by this Court. *Peake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 291 F.2d 329 (2d Cir.), *aff'd*, 370 U.S. 254, 255 n. 1 (1962).

In addition to the diminished utility of certification, its use is antagonistic in principle to this Court's expanding need to control its crowded dockets and to curtail the volume of its mandatory jurisdiction, as is evidenced by the procedures it has established to screen

cases asserting a right of appeal. The courts of appeals should not be empowered to decide in their sole discretion through certification what matters are of sufficient importance to require decision by this Court. That is increasingly a matter for this Court alone to decide. C. Wright, *Federal Courts* § 106 (2d Ed. 1970).

In sum, the certification jurisdiction has become a little needed and little used anachronism. Consequently, it is entirely appropriate that this Court decline to answer any question the expeditious resolution of which serves no significant purpose.

B. No Significant Purpose Will Be Served By Expediting The Resolution Of The Question Certified.

The Certificate of the United States Court of Appeals for the Fourth Circuit reveals that in *Moody, et al. v. Albemarle Paper Co., etc., et al.*, No. 72-1267, the rehearing *en banc* has already been held and a tentative decision has been reached. If this Court does not answer the question certified, the court of appeals need only confirm its tentative decision and issue an opinion. The aggrieved party could then apply for certiorari because of a conflict among the circuits with respect to the question certified and because of important questions upon which the court of appeals is divided in the disposition of the case on the merits. In *Williams et al. v. The Albemarle City Board of Education, etc.*, No. 73-1179, the vote was to deny a rehearing *en banc*. Consequently, if this Court does not answer the question certified, the decision and opinion of the initial hearing panel will remain the decision of the court, and the party aggrieved may apply immediately for certiorari.

Thus the Court of Appeals has virtually terminated its proceedings in both cases and can conclude them expeditiously without this Court's assistance. Therefore, an answer to the question certified will neither break a judicial deadlock there nor obviate a lengthy proceeding, the validity of which is threatened by the incorrect resolution of a threshold question of law, two possibilities which this Court has previously recognized as reasons for invoking the certification jurisdiction. For example, in *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), this Court suggested that certification would be appropriate if the same issue were raised by another case already pending before it. And in *United States* v. *Barnett*, 376 U.S. 681 (1964), the most recent case successfully invoking the certification jurisdiction, the Court of Appeals for the Fifth Circuit had divided on the question of whether the defendants were entitled to a jury trial in a proceeding to hold them in contempt of an order of that court. But there the court of appeals was exercising original jurisdiction, its members were equally divided on the question and it could not, therefore, render an appealable order or judgment until the deadlock was broken. Suppose, however, that a bare majority of that court had correctly concluded that jury trial was not required. Arguably the court might still have reasonably sought an immediate answer to the question because of its closeness and threshold nature and because of the unusual public importance of the proceeding itself.

By contrast, no such purposes would be served by answering the question certified here. The Judges of the Fourth Circuit are divided on questions involving the merits of the two cases, not on the question cer-

tified. In *Moody*, the *en banc* hearing has already been held; in *Williams*, it has effectively been denied. Thus the resolution *now* by this Court of the question certified, rather than *later* upon a grant of certiorari, will obviate only the writing of an opinion on the merits for the court *en banc* in *Moody*. In return, however, a rehearing *en banc* in *Williams* may be required, and, more importantly, petitions for certiorari would probably soon thereafter be filed seeking review on the merits. As appears in their Memorandum On The Appropriateness of Certification From The Court of Appeals For the Fourth Circuit, p. 2, n. 1, plaintiffs emphasize that the two cases raise important questions on the merits, upon which the members of the court of appeals are closely divided, involving, *inter alia*, the proper interpretation of this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Thus, whichever way the certified question is answered, one or both of the sides in both cases would probably seek certiorari.[1]

In sum, declining to answer the question certified would require no additional proceedings in the court of appeals and would limit the proceedings in this Court, if certiorari were granted, to a single occasion.

[1] If the question certified were answered in the affirmative, in *Williams* the decision of the initial hearing panel would become the decision of the court, and plaintiffs would presumably seek certiorari to review its decision reversing an award of damages; in *Moody* the Fourth Circuit predicts that it will modify the decision of the initial hearing panel, which reversed the trial court's denial of back pay, as a result of which one or both sides may apply for certiorari. If the question certified were answered in the negative, a rehearing *en banc* would presumably have to be held in *Williams*. The court of appeals opines in its certificate that it would then divide equally and affirm the judgment of the district court awarding damages, a result that would create for defendant an appealing occasion to seek certiorari.

By contrast, if the question certified were answered, it might require another rehearing *en banc* in the court of appeals and an additional proceeding on the merits before this Court. This situation is analogous then to one in which a verdict winner seeks to obtain immediate review in a court of appeals by writ of prohibition of a district court's debatable ruling that it was empowered to grant judgment notwithstanding the verdict on its own motion because it reserved decision on a motion for directed verdict, in a case where the question of the sufficiency of the evidence was also extremely close. The writ would surely be denied in such a situation, without regard to the fact that the question involved affects the duties, responsibilities and powers[*] of the judges of the federal district

[*] The Certificate of the Court of Appeals for the Fourth Circuit pointedly employs these words without further explanation as if they had some talismanic significance. Upon analysis, however, no such significance appears. Questions involving the powers of courts or judges may perforce arise more frequently than substantive questions. But, as the Court's Certificate also reveals, this is the first time that the proper construction of the Act of 1963 to clarify the status of judges after retirement has assumed determinative importance in the Fourth Circuit. Thus, deferring resolution of the question until certiorari is granted does not realistically involve the risk that decisions in numerous other cases will be similarly "flawed." Furthermore, although erroneous rulings by judges enlarging their powers may sometimes invoke the specter of oppressive judicial overreaching, which should obviously be corrected at the first opportunity, no such possibility is involved here. Senior judges are clearly empowered to participate by assignment in the decision of the initial hearing panel and thereafter in any rehearing *en banc*. Assuming *arguendo* that these judges are prohibited by statute from also participating in the vote to determine whether a rehearing *en banc* shall be ordered, a less harmful exercise of unconferred power could hardly be imagined. Thus, the fact that this one aspect of the duties, responsibilities and powers of these judges is in question does not create a crisis in judicial administration.

courts, because the proceedings in the district court were almost completed. Furthermore, the case would probably be appealed on the merits even if the writ were granted, and, if the writ were denied and on appeal it was held that the trial judge lacked the power in question, the court of appeals could still order the entry of judgment on the verdict without the necessity for a new trial. Appellant, The Albemarle City Board of Education, submits that this case is no different in any significant regard,[3] and that expediting resolution of the question raised here would similarly cause delay and consume additional judicial time without accomplishing any significant offsetting purpose.

Thus, the only apparent justification for certification here is the existence of a division among the circuits on the question certified. On at least one occasion this Court has answered a certified question for this reason. *United States* v. *Wise Law*, 245 U.S. 387 (1918); *cf. Middletown Nat. Bank* v. *Toledo*, 197 U.S. 391 (1905) (answering a question of state law upon which there was only potential conflict among the states); *but see Columbus Watch Co.* v. *Robbins*, 148 U.S. 266 (1893). But as the number of such intercircuit differences has proliferated since that time, access to this Court to resolve them has been almost exclusively limited to the grant of certiorari, and it would hardly be prudent today to reaffirm the now almost extinct principle that a difference among the

[3] The verdict winner may obviously appeal to the court of appeals if, in the example given, the writ is denied and judgment notwithstanding the verdict is entered, whereas the party aggrieved here could only apply for certiorari to resolve the question if it is not answered. But if the question certified is regarded as being of sufficient importance, this Court is hardly foreclosed from granting certiorari to resolve it.

circuits is *alone* sufficient to invoke the certification jurisdiction. Indeed, it would come as a great surprise to all those disappointed litigants who have sought unsuccessfully since then to obtain certiorari on the ground that they might otherwise have gained their end by first requesting the court of appeals to certify the disputed question.

For all these reasons, no significant purpose would be served by expediting the resolution of the question certified, and accordingly, this Court should decline to answer it.

II. IF THE QUESTION CERTIFIED IS ANSWERED, IT SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The question certified reads as follows:

> Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be heard *en banc*.

In *United States* v. *American Foreign Steamship Corp.*, 363 U.S. 685 (1960), this Court held that a retired circuit judge who had participated in an initial panel decision before retirement was not permitted to participate in the rehearing of the case *en banc*. This result was said to be required by 28 U.S.C. § 46(c), which provided that in the United States Court of Appeals "(c)ases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service," and that "(a) court in banc shall consist of all active circuit judges of the circuit." The opinion, however,

conceded that "persuasive arguments" could be advanced for allowing such participation in the future and called favorable attention to corrective legislation that had been recommended by the Judicial Conference of the United States. Several years later Congress enacted P.L. 88-176, 77 Stat. 331 (1963), "Judges: Status After Retirement," "An Act to clarify the status of circuit and district judges retired from regular active service." This enactment, which made certain editorial changes in the first two sentences of § 46(c) and added a third in the language recommended by the Judicial Conference, provides as follows:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consists of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

In their renowned book, *The Legal Process: Basic Problems in the Making and Application of Law* (Tentative Edition 1958), Professor Hart and Dean Sacks refer to such events as the interstitial correction of decisional doctrine. In this process, the note, litigation frequently ensues because of negative implications arguably pregnant in the legislature's failure to touch on related problems, and too often there follow discordant constructions totally at odds with the legislature's manifest purpose. *Id.* at 802-03. Such a problem is presented here. An overly literal reading of the

sentence added to § 46(c) in 1963 suggests that a retired circuit judge who sat in the court or division at the original hearing has been empowered to participate only in the rehearing *en banc*, and, therefore, has been excluded by negative implication from participation in the vote to determine whether a rehearing *en banc* will be ordered. On the other hand, this sentence can also be read to provide that such a retired judge is deemed to be a judge in regular active service for purposes of the entire rehearing process governed by the first two sentences, on the theory that the grant of the greater power to participate in the rehearing itself carries with it the lesser ancillary power to participate in the vote ordering a rehearing.

Such a construction, which the Fourth Circuit has apparently adopted, is consistent with Rule 35(b) of the Federal Rules of Appellate Procedure,[1] which provides that such retired judges may also participate fully in the decision as to whether the suggestion of a party for rehearing *en banc* will be put to the vote of the judges of the Circuit. Thus, those who dispute the Fourth Circuit's construction must contend that, although such retired circuit judges may participate fully in the process of deciding whether there will be a vote on a suggestion for a rehearing *en banc* and in the actual rehearing *en banc*, they were intentionally excluded by the Judicial Conference and by Congress from participating in the vote to order such a rehearing. But no such purpose is disclosed in the words of the statute or in its legislative history. In fact, there

[1] Fed. R. App. Pro. 35(a) merely adopts the language of 28 U.S.C. § 46(c) with respect to who may participate in the vote to order a rehearing *en banc*. Thus it assumes no additional significance in determining the proper construction of the statute.

is no mention whatsoever of this question, much less its proposed solution, in the reports of the Judicial Conference, 1959 Ann. Rep. of the Judicial Conference 9-10, or in the Reports of the House and Senate urging enactment of the proposed legislation. Contrariwise, the letter transmitting the recommendations of the Judicial Conference to the Speaker of the House of Representatives, and the Senate Report,[5] both of which are set forth in 1963 U.S.C. Cong. & Ad. News 1105-06, state that the legislation was specifically designed to exclude retired circuit judges from certain other duties; namely, participating in the appointment of officers of the court, participating in the promulgation of the rules of the court, and sitting as a member of the judicial council of the Circuit. Can it then be maintained that Congress and the Judicial Conference, while specifically dealing with those duties that a retired judge was not to perform, intended by negative implication to bar him from the performance of another duty merely ancillary to the one he was specifically authorized to perform?

To overcome this dilemma, the Memorandum of Appellants Moody, et al., and Appellees Williams, et al., on the Appropriateness of Certification from the Court of Appeals for the Fourth Circuit, pp. 10-13, suggests that sound policy supports the exclusion of such retired judges from the vote to order a rehearing *en banc*. The Memorandum fails, however, to point to anything in the legislative history of the Act of 1963 indicating Congressional awareness or approval of such a judgment. In fact, there is no such history and the suggestion represents nothing more than an ingenious

[5] The House Report is identical to the Senate Report

effort by counsel to provide a justification for an imagined legislative purpose. Even the ingenuity of the argument is questionable. The Memorandum suggests that the members of the court in regular active service are primarily responsible for its integrity as an institution and are in the best position to decide when an *en banc* hearing is needed to harmonize conflicting panel decisions or to decide important questions; therefore, Congress could reasonably have sought to distinguish between participation in the rehearing and participation in the vote to order it. But, as the Memorandum itself discloses, this is the very same argument formerly employed to justify the exclusion of retired circuit judges from participation in the rehearing itself. Thus an argument that Congress presumably interred in the Act of 1963 is now resuscitated to justify an otherwise undisclosed purpose in that very same enactment.

Considered on its merits alone, the argument also fails. A retired circuit judge who participates in the initial hearing must obviously familiarize himself with any prior decisions that might conflict with the panel's decision. For this reason arguably he would be more informed on the need for a rehearing than would the court's other nonparticipating members, who may not fully recall or be familiar with these prior, allegedly conflicting decisions. Perhaps because he is so informed, Rule 35(b) of the Federal Rules of Appellate Procedure wisely permits him to participate fully with the other members of the panel in determining whether a suggestion for a rehearing *en banc* will be put to a vote of the court. And, for the same reason, 28 U.S.C. § 46(c) authorizes him to participate fully in the rehearing itself. Since he may then participate fully in

the first and third stages of the rehearing process, his deliberate exclusion from the second stage would be inconsistent, to say the least. The suggestion that Congress reasonably intended this inconsistency is beyond belief.

In support of this conclusion, it should be noted that while the Court of Appeals for the Second Circuit has ruled that Congress failed to authorize such participation in the second stage, a majority of its members regard this omission as inconsistent and unfortunate. *Zahn* v. *International Paper Company*, 469 F.2d 1033, 1041, 1042 n. 1 (2d Cir. 1972) (concurring opinion of Judge Mansfield and dissenting opinion of Judge Timbers on petition for rehearing *en banc*), *aff'd. on the merits*, 94 S. Ct. 505 (1973). Furthermore, the decision of the Court of Appeals for the Fifth Circuit in *Allen* v. *Johnson*, 391 F.2d 527 (5th Cir. 1968), while not specifically in point here,[6] suggests that its members would also support the full enfranchisement of these retired judges. In fact, during the entire time that the "problem" of these judges has shuttled back and forth between the Congress and the courts, no significant body of judicial or legislative opinion opposing their participation in any

[6] This case held that a retired circuit judge who was a member of the initial hearing panel was competent to sit at a hearing or rehearing *en banc*, even though the panel had not announced a decision or rendered an opinion in the case. In concluding, the opinion stated that "en banes can be ordered only by active judges." 391 F. 2d at 532. Whether this dictum represents the conclusion that the court would reach after full consideration of the question presented here is not as clear as the Memorandum of Appellants Moody, et al., and Appellees Williams, et al., p. 10 n. 7, unequivocally suggests, especially in view of that court's willingness to read § 46(c) expansively on the facts of that case.

stage of the rehearing process has emerged. Surely the time has now come for this Court to put an end to this demeaning process, by which the capabilities of these retired judges have at least implicitly been questioned.

Consequently, we would urge that the final sentence of § 46(c), which extends to retired circuit judges the greater power to participate fully in the rehearing *en banc*, should be read to include by implication the lesser, ancillary power to participate in the vote to order such a rehearing. Such a reading is clearly not beyond the limits of reasonable statutory construction. In *Allen v. Johnson*, 391 F. 2d 531 (5th Cir. 1968), the court similarly read the statute expansively to reach an analogous result. And as the opinion there noted, that court increasingly requires the assistance of these judges "to keep up with its exploding docket . . . ." 391 F. 2d at 529. Surely if the busy active members of the court can profit from the special expertise of the retired judge in the first and third stages of the rehearing process, they can profit as well from his participation in the second.

Admittedly, the construction we urge requires a certain elaboration of Congressional purpose beyond the literal words of the statute. But the judicial role is not simply one of literary critic standing in judgment of the works of Congress. Rather, the courts are the coequal partners of the legislature in assuring the just and sensible elaboration of statutes. As Professor Hart and Dean Sacks have stated:

> Enacted law may displace decisional law as a means of initial formulation of legal arrangements, but not as a means of elaboration. For enactments need to be interpreted, and interpre

> tation can scarcely be avoided at the stage of authoritative applications in the decision of particular controversies. *Here the two forms of law work in cooperation rather than competition.*[1]

This Court has, on occasions too numerous to recount here, harmonized apparently inconsistent statutory words, or declined to give substance to unintended negative pregnants. There come to mind immediately the numerous decisions harmonizing and interpreting the provisions of the Robinson-Patman Act. *E.g., Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969); *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). More closely in point perhaps is the refusal of the federal courts to conclude that the provisions of 28 U.S.C. § 1338(b), providing for pendent jurisdiction of "a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws," were intended by negative implication to forbid further judicial extension of the doctrine to other areas. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In conclusion, we contend that the construction we have urged clearly embodies the true legislative purpose, and that the failure of Congress to make this meaning explicit in the final sentence of § 16(c) should be regarded, to use the felicitous words of Mr. Justice Holmes, as a "mis-prision or abbreviation that does not conceal the purpose to be gathered from the previous and following words." *St. Louis San Francisco R.R. v. Middlekamp*, 256 U.S. 226, 232 (1921). Here the other provisions of the Act of 1963 specifi-

[1] H. Hart and A. Sacks, *The Legal Process* 140 (Tentative Edition 1958) (emphasis added).

cally listing those other powers that retired circui
judges were not to exercise cogently supports this con
Fred Meyer, Inc., 390 U.S. 341 (1968). More closel
clusion. 1963 U.S.C. Cong. & Ad. News 1105-06.

CONCLUSION

Appellant, The Albemarle City Board of Education
respectfully urges this Court to decline to answer th
question certified. Alternatively, if the Court de
cides to answer the question, it is submitted that th
proper answer is in the affirmative.

Respectfully submitted,

Richard Lane Brown III
Corner Main and Second Street
Albemarle, North Carolina 2800
Attorney for Appellant Below
The Albemarle City Boar
of Education in N. 73-179

Of Counsel:

Richard L. Brown, Jr.
Corner Main and Second Streets
Albemarle, North Carolina 28001

Marvin B. Lewis
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514

Charles P. Brown
Corner Main and Second Streets
Albemarle, North Carolina 28001

February 1974.

St

Fra
Pat
Jam
H

P.
Ri

Geo
Fi
L
M

Dat

it
i
ly

n.
w
e
w

t
N
w.
ed
y

FEB 13 1974

MICHAEL RODAK, JR. CLERK

In The

Supreme Court of the United States

No. 73-899

JOSEPH P. MOODY, ET AL.,
Appellants,
v.
ALBEMARLE PAPER COMPANY, ET AL.,
Appellees.

* * * *

BAXTER K. WILLIAMS, ET AL.,
Appellees,
v.
THE ALBEMARLE CITY
BOARD OF EDUCATION,
Appellants.

On Certificate from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR EMPLOYER APPELLEES IN MOODY
(Albemarle Paper Company and its Successors)

FRANCIS V. LOWDEN, JR.
PAUL M. THOMPSON
JAMES A. JONES, III
Hunton, Williams, Gay
& Gibson
P. O. Box 1535
Richmond, Virginia 23212

GORDON G. BUSBRIDGE, ESQ.
Fargie and Benson
1300 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402

JULIAN R. ALLSBROOK, JR., ESQ.
Allsbrook, Benton, Knott,
Allsbrook & Cranford
Post Office Box 108
Kidd Building
Roanoke Rapids, North Carolina

CHARLES F. BLANCHARD, ESQ.
Yarborough, Blanchard, Tucker
& Denson
P. O. Drawer 30
Raleigh, North Carolina 27602

Counsel for Appellees

Dated: February 12, 1974

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statute And Rule Involved	2
Question Certified	2
Statement Of The Case	2
Summary Of Argument	5
Argument	
I The *En Banc* Rehearing Practice of the United States Court of Appeals for the Fourth Circuit Is Properly Within that Court's Procedural Discretion To Provide the Manner in Which *En Banc* Rehearings Will Be Initiated	6
II The *En Banc* Procedure Followed by the Court of Appeals for the Fourth Circuit in *Moody* Was Within Its Discretion	11
III Even if the *En Banc* Rehearing Procedure of the Fourth Circuit Is In Error, Correction of any such Procedural Error Should Not Operate To Nullify the Rehearing *En Banc* Ordered and Held in *Moody*	15
Conclusion	18
Certificate Of Service	19
Appendices	App 1

TABLE OF CITATIONS

Cases

Allen v State Board of Elections, 393 U.S. 544 (1969)	16
Allen v Johnson, 391 F.2d 527 (5th Cir 1968)	10

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)

Copriano v. City of Houma, 395 U.S. 701 (1969)

England v. Medical Examiners, 375 U.S. 411 (1964)

Lemon v. Kurtzman, 411 U.S. 192 (1973)

Lubletter v. Walker, 381 U.S. 618 (1965)

Shenker v. Baltimore & Ohio Railroad Co., 374 U.S. 1 (1963

U.S. v. American Foreign Svc. Corp., 363 U.S. 685 (1960)

Western Pacific Railroad Corp. v. Western Pacific Railroad
345 U.S. 247 (1953) 6, 7, 8, 9, 10, 11

Williams v. U.S., 401 U.S. 646 (1971)

Zahn v. International Paper Company, 469 F.2d 1033 (2nd
1972)

Statutes

28 U.S.C.
§ 86 2, 5, 7, 8, 9, 10
§ 294
§ 296
§ 371

[illegible]

[illegible]

[illegible]

[illegible]

In The

Supreme Court of the United States

No. 73-899

JOSEPH P. MOODY, ET AL.,

Appellants,

v.

ALBEMARLE PAPER COMPANY, ET AL.,

Appellees,

* * * *

BAXTER K. WILLIAMS, ET AL.,

Appellees,

v.

THE ALBEMARLE CITY BOARD OF EDUCATION,

Appellants.

On Certificate from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR EMPLOYER APPELLEES IN MOODY
(Albemarle Paper Company and its Successors)

OPINIONS BELOW

The opinion of the district court is not reported. The opinion by the panel for the court of appeals is reported at 474 F.2d 134.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit certified in the above captioned actions a question of appellate procedure on which it desired instruction. The certificate was filed on December 6, 1973. On January 14, 1974, an order was entered by this Court granting the parties leave to file briefs in response to the question cer-

tified. Jurisdiction in this Court is predicated upon 28 U.S.C. § 1254(3).

STATUTE AND RULE INVOLVED

The question certified involves 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure.

QUESTION CERTIFIED

"Under 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?"

STATEMENT OF THE CASE

This brief is submitted with respect only to the above-entitled *Moody* action. That litigation has proceeded as a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

The district court found that certain of the employment practices of Albemarle Paper Company ("Albemarle") prior to July 2, 1965, were racially discriminatory, and that the effect of that discrimination had been perpetuated by the seniority system. The district court enjoined Albemarle and the Defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against black employees, and ordered that the seniority system be modified so that plant-wide seniority would be applied when a black employee was affected. No appeal was taken from these provisions of the district court's decree, since the Defendants had consented thereto.

The district court found Albemarle's personnel testing procedures to be job-related and upheld use of such pro-

cedures. In addition, the district court, exercising its discretion under 42 U.S.C. § 2000e-5(g), declined to award back pay. Plaintiffs appealed the testing and back pay rulings to the United States Court of Appeals for the Fourth Circuit.

That appeal was heard by a panel comprised of Circuit Judge Craven and Senior Circuit Judges Boreman and Bryan. By opinions filed February 20, 1973, that panel reversed the district court on both the testing and back pay issues. In each instance, the decision was divided, with different combinations of the three judges providing the necessary majority. On the testing question, Judge Craven was joined by Judge Boreman, with Judge Bryan dissenting. On the back pay question, Judge Craven was joined by Judge Bryan, with Judge Boreman dissenting.

Following the decision of the divided panel, Employer Appellees, on March 6, 1973, filed their petition for rehearing and suggestion of a rehearing *en banc*. Defendant Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO, also filed a petition for rehearing *en banc*.

On June 25, 1973, the Court of Appeals for the Fourth Circuit, by Clement F. Haynesworth, Chief Judge, filed its order granting the petitions for rehearing. That order provided:

> "Upon consideration of the petitions for rehearing, it appearing that a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original hearing panel, have voted to grant the petitions,
>
> It Is Now Ordered that the petitions for rehearing *en banc* be, and they hereby are, granted. The *en banc* hearing will be scheduled by the Clerk."

Following that order for rehearing, Employer Appellees on July 3, 1973, filed a motion for leave to file a supplemental brief for rehearing *en banc*. Plaintiff Appellants also filed a motion for leave to file a supplemental brief on rehearing *en banc*. Appellants' motion did not challenge the ordered *en banc* procedure, but rather argued that case developments subsequent to the panel decision required supplemental briefing, and that such briefing was also needed to respond to the arguments of Appellees. The United States Equal Employment Opportunity Commission ("EEOC") also filed a motion for leave to file a supplemental brief as *amicus curiae*. The requested leave to file supplemental briefs was granted on July 9, 1973. By August 31, 1973, all parties had filed supplemental briefs. In their supplemental brief, Appellants' arguments were addressed entirely to the merits of the issues presented on the appeal; in no way did Appellants challenge the propriety of the ordered *en banc* rehearing, nor even raise the question of Senior Circuit Judges Boreman and Bryan having voted on the petitions for rehearing, despite the express reference thereto contained in the court's order granting the petitions for rehearing *en banc*.

Oral argument on the rehearing *en banc* was held on October 2, 1973, and in the course thereof, no question was raised by any party relating to the propriety of the *en banc* rehearing procedure.

After the matter had thus been submitted to the *en banc* court for decision, the parties were advised on or about December 6, 1973, that the Court of Appeals for the Fourth Circuit was seeking Supreme Court certification of a question encountered in *Moody* and in *Baxter K. Williams, et al. v. The Albemarle City Board of Education, etc.*, No. 73-1479.

The question as certified is:

> "Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?"

The certification is from two separate actions. In its certificate, the court has stated the circumstances in which the question arises in *Moody*:

> "In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay." (Certificate at 2.)

In contrast, in *Williams*,

> "No formal order has been entered on the petition for rehearing with a suggestion of rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose." (Certificate at 2.)

On January 14, 1974, the Supreme Court granted leave to the parties to file briefs in response to the question certified by the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The legislative history and judicial interpretation of 28 U.S.C. § 46(c) make clear that § 46(c) is merely a

grant of *en banc* power to the courts of appeals and that the courts themselves have broad discretion in establishing specific procedures for the initiation of their *en banc* power. The majority of judges in regular active service may exercise initiation responsibility for *en banc* rehearings or they may entrust such responsibility to some other group of circuit judges. Such an entrustment is precisely what the Fourth Circuit has done in committing the initiation decisions for rehearings *en banc* to the circuit judges in regular active service and the senior circuit judges who sat on the original hearing panel. This practice results in an effective and efficient use of *en banc* rehearings in the Fourth Circuit and should therefore be upheld as a valid exercise of the court of appeals' discretionary power.

Even if this Court holds that the Fourth Circuit's practice is invalid, past decisions of this Court indicate that such a decision should not be applied to invalidate the rehearing *en banc* ordered in *Moody*. Since the rehearing has already been held in *Moody* and a tentative vote announced by the court *en banc* contrary to the panel's decision, this Court's decision should be given prospective effect only.

ARGUMENT

I.

The *En Banc* Rehearing Practice of the United States Court of Appeals for the Fourth Circuit Is Properly Within that Court's Procedural Discretion To Provide the Manner in Which *En Banc* Rehearings Will Be Initiated.

An affirmative answer to the questions presented by this certification is required by this Court's decisions in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 (1953). It is wrong to read 28 U.S.C.

§ 46(c)[1] and conclude that the sole procedure available to the courts of appeals for initiation of *en banc* proceedings is a majority vote by the circuit judges in regular active service. *Western Pacific* makes clear that the § 46(c) clause, "unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service," is merely a grant of *en banc* power to the courts of appeals; the courts themselves have broad discretion in establishing specific procedures for initiation of their *en banc* power.

The precise question raised in *Western Pacific* was whether a litigant by virtue of § 46(c) had a right to compel the full court of appeals to determine whether it would exercise its *en banc* power. In answering this question in the negative, Chief Justice Vinson concluded that a study of the legislative history of § 46(c):

> "makes it quite clear that the draftsmen intended to grant the *en banc* power and no more; the court itself was to establish the procedure for exercise of the power." 345 U.S. at 257.

The opinion makes clear that in establishing that pro-

[1] 28 U.S.C. § 46(c) was enacted by Congress in 1948 and amended in 1963. The statute as enacted before with the italicized words indicating the language added to the 1963 amendment:

> § 46. Assignment of judges; divisions; hearings; quorum
>
> . . . .
>
> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. *A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.*

cedure, each court of appeals has a wide latitude of discretion:

> "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised.
>
> • • •
>
> "Having wide discretion the court may provide that the power may be called into play by any procedure convenient to the court . . . ." 345 U.S. at 259.

And moreover,

> "In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." 345 U.S. at 250.

Furthermore, the Court observed that initiation of rehearings *en banc* by a vote restricted to the judges in active service would be appropriate, but was not required. As an alternative, this Court expressly sanctioned a procedure whereby the majority entrusts the responsibility for initiation of the *en banc* proceeding to the panel that had initially heard the case. 345 U.S. at 259. This Court's view of the discretionary *en banc* power was succinctly summarized in the following passage:

> "Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine there will be hearings or rehearings *en banc*, or they may delegate the responsibility for the initiation of the *en banc* power to

the divisions of the court. But in recognizing the full scope of § 46(c), the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibilities may have been delegated to the division. And, recognizing the value of an efficient use of the *en banc* power, the court should adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will be better able to change its *en banc* procedure, should it deem change advisable." 345 U.S. at 261.

By recognizing that the courts of appeals should have broad discretion in determining whether to hear a case *en banc*, this Court's decision in *Western Pacific* demonstrated *en banc* proceedings are internal mechanisms designed for use by a court of appeals in discharging its responsibility to formulate precedents uniformly and authoritatively.[2] In particular, these proceedings are used to resolve intra-circuit conflicts and lend the authority of the full bench to a decision resolving an important "question of law" in the circuit. The procedure employed to initiate the *en banc* proceeding not only must properly identify "appropriate" cases but must also consider the effect of *en banc* proceedings on the circuit court's docket. An effective procedure, therefore, must be flexible and tailored to the particular circumstances within each circuit. By recognizing broad discretionary power in each court of appeals, this Court has ensured that *en banc* proceedings will be properly utilized in all circuits.

Subsequent events have not affected the principles an-

[2] *See* Note, *En Banc Hearings In The Federal Courts of Appeals Accommodating Institutional Responsibilities*, 40 N.Y.U. L. Rev. 568, 574-592 (1965).

nounced in *Western Pacific*. In two decisions by this Court, *U.S. v. American Foreign SS. Corp.*, 363 U.S. 685 (1960), and *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 4 (1963), the broad discretionary power of the courts of appeals over exercise of their *en banc* power was again endorsed. *American Foreign* dealt with the question whether senior circuit judges, members of the initial hearing panel, were entitled to sit on the court *en banc* when the case was reheard. The opinion specifically endorsed *Western Pacific* by noting that *American Foreign* did not involve any issue as to the procedure to be followed by a court of appeals in determining whether a hearing or rehearing *en banc* was to be ordered and by stating:

> "In the *Western Pacific Railroad Case*, . . . it was held that this question is largely to be left to the intramural determination by each of the Courts of Appeals. 'The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing . . . .'" 363 U.S. at 688. (Emphasis added.)

The principles of broad procedural discretion as expressed in *Western Pacific* and ratified in *American Foreign* have not been weakened by the 1963 amendment to § 46(c)[1] nor by the promulgation of Rule 35 of the Federal Rules of Appellate Procedure.[2] Any suggestion that the dicta of the circuit courts in *Zahn v. International Paper Company*, 369 F.2d 1055, 1061, 1062 (2d Cir. 1972), and in *Allen v.*

[1] See fn. 1, *supra*, enumerated portion. That amendment was enacted to modify the situation existing after the Court's decision in *American Foreign* so that there is no doubt that a circuit judge of the circuit who has retired from regular active service is competent to sit on an *en banc* rehearing of a case in which he sat in the court at the original hearing thereof.

[2] The notes of the Advisory Committee relative to Rule 35 make clear that the rule was promulgated in aid of the principles announced in *Western Pacific*.

Johnson, 991 F.2d 127, 133 (4th Cir. 1993), have somehow limited that broad discretionary power is contrary to *Western Pacific* and is simply erroneous.[5]

In summary, the very essence of *Western Pacific* and subsequent decisions is that the respective courts of appeals have a wide discretionary power to formulate their own procedures for initiation and implementation of the *en banc* power. Because of that broad discretion, we believe that the question certified in these actions must be answered in the affirmative.

II

The En Banc Procedure Followed by the Court of Appeals for the Fourth Circuit in Moody Was Within Its Discretion

When measured by the principles set forth in *Western Pacific*, the practice utilized in the Fourth Circuit for initiating *en banc* rehearings was clearly valid. In the exercise of its broad discretion, the court of appeals entrusted the *en banc* decision to a vote by the senior circuit judges who sat on the original hearing panel and the circuit judges in regular active service. This entrustment is virtually indistinguishable from the entrustment expressly approved in *Western Pacific*. If an entrustment of initiation responsibility to the original panel is proper, surely there can be nothing improper about the entrustment involved in the

[5] The opinions in *Cohen* and *Allen* were addressed to *en banc* questions different from the one under consideration here. *Cohen* dealt with the question whether the "majority" referred to in § 46(c) was an absolute majority of the judges in regular active service or a majority of the regular active judges qualified to vote. *Allen* was focused on the question whether a senior judge member of a panel which had originally heard the case but had not rendered a decision was competent to sit on the *en banc* court rehearing of the same case. In any event, it is clear that there is nothing in *Western Pacific* which prevents a particular court of appeals from setting for itself *en banc* procedures which may be more restrictive than those permitted under *Western Pacific*.

Fourth Circuit's practice. Utilization of such a practice should be considered within the broad discretion of the court of appeals, since it is apparent that this initiation procedure results in effective use of *en banc* proceedings in the Fourth Circuit.

The Court of Appeals for the Fourth Circuit is composed of seven active circuit judges and two senior circuit judges. The two senior circuit judges are Judge Boreman and Judge Bryan. They are retired judges pursuant to 28 U.S.C. § 371 but are important forces on the court. Both of these senior circuit judges assume a full circuit judge role in the court's proceedings; during the months they sit Judge Boreman sits during approximately two thirds of the court's sessions and Judge Bryan sits approximately three fifths of the time. Judges Boreman and Bryan therefore shoulder caseloads approximately equal to two thirds and three fifths, respectively, of the caseload carried by an active judge on the court of appeals.[8]

In view of the active role the court of appeals' decision to have Judges Boreman and Bryan participate in the *en banc* decision when they have been members of the original hearing panel is certainly reasonable. Active participation in the docket gives them the perspective necessary to determine whether a case being considered for *en banc* proceedings creates or raises the potential for intra circuit splits between differently composed panels. In addition, their research and preparation, resulting from participation in the initial panel hearing, prepare them for making an intelligent evaluation of the question whether the issues involved in a particular case require an authoritative decision rendered by the full bench.

The conclusion that the Fourth Circuit's practice is not

[8] *See* letter from Mr. William K. Slate, II, dated January 25, 1974, in Appendix A.

an abuse of its discretion is also supported by the fact that at least one other court of appeals employs *en banc* initiation procedures which allow voting by senior judge members of the initial hearing panel. Contrary to appellant's contention that the Fourth Circuit's practice is unique, a recent poll of the circuits indicates that at least the Ninth Circuit employs procedures virtually identical to those used in the Fourth Circuit.[1]

No good reason exists for interpreting § 46(c) to provide that a senior circuit judge is a member of the court *en banc* for rehearing purposes, but is not entitled to vote in the decision whether the case should be reheard *en banc*. The theory that such an interpretation is required to effectuate a Congressional intent to vest determination of future doctrinal trends in the active judges of the circuit does not hold water in view of the 1963 amendment of § 46(c). By providing for senior circuit judge membership on the *en banc* court for rehearing purposes, the 1963 amendment makes clear that the major doctrinal trends set in *en banc* rehearings will be formulated by both the judges in regular active service and senior circuit judges sitting on the initial hearing panel.

In addition, the Fourth Circuit's practice is consonant with the general statutory framework for the federal judicial system which makes maximum use of the judicial services of senior circuit judges. 28 U.S.C. § 294 provides for the designation and assignment of senior circuit judges to perform such judicial duties as they are willing and able to undertake. When so designated and assigned, 28 U.S.C. § 296 provides that senior circuit judges shall have the following powers:

[1] *See* letter from Mr. William B. Luck, dated February 6, 1974, in Appendix A.

> "Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated or assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices."

Finally, the legal questions involved in the *Moody* panel decision were manifestly appropriate for rehearing *en banc*. The initial hearing panel was divided three ways on the issues presented. The panel's decision on each of the major issues was dependent upon the votes of senior circuit judges on the panel. Other decisions of the Fourth Circuit and other circuits are apparently in conflict with portions of the panel decision. Appellants themselves claimed that decisions subsequent to the panel determination required consideration. Moreover, the issues presented were and are important issues. The existence of such factors supported the need for *en banc* determination. That determination was ordered by the court, and the matter was heard by the full court. Appellants, having been advised by the court that the *en banc* decision will modify the panel determination which was favorable to them, now argue that the briefing, argument and rehearing by the court should be ignored. Clearly, such a result is not consistent with efficient judicial administration.

This Court, therefore, should uphold the court of appeals' practice as within the scope of the court's discretionary power outlined in *Western Pacific*, and, in fact, should commend the procedure as one which appropriately accommodates discretionary *en banc* power with the judicial duties and service of Senior Circuit Judges Boreman and Bryan in the Fourth Circuit.

III.

Even if the En Banc Rehearing Procedure of the Fourth Circuit Is in Error, Correction of any such Procedural Error Should Not Operate to Nullify the Rehearing En Banc Ordered and Held in Moody.

A negative answer to the question certified would invalidate the well-established *en banc* initiation practice followed in the Fourth Circuit and would repudiate the clear statement in *Western Pacific* that courts of appeals have broad discretionary power to formulate their own *en banc* procedures. It would mean that all courts of appeals must adhere to one specific procedure for the exercise of their *en banc* power. Under such a rule, *en banc* proceedings will be valid only if they have been ordered by a majority vote of the circuit judges in regular active service.[8] In short, a negative answer to the question certified in effect would be tantamount to creation of a new rule of civil appellate procedure.

When this Court has created a new rule in the past, it has often been faced with the question whether the rule should be given prospective or retroactive effect. In *Linkletter* v. *Walker*, 381 U.S. 618, 628 (1965), Justice Clark traced the history of prospective judicial decision-making and concluded that "the Court may in the interest of justice make the rule prospective."

This Court has indicated at least three factors to be relevant to every prospective effect inquiry. The first of these factors is an evaluation whether the purpose of the new rule requires either prospective or retroactive application. *Williams* v. *U.S.*, 401 U.S. 646, 653 (1971); *Linkletter* at 629. The second factor is a consideration of the amount of injustice and hardship a party would suffer from a retroactive application of the new rule. *Lemon* v. *Kurtzman*, 411 U.S. 192, 207-209 (1973); *Chevron Oil Co.* v.

[8] Although the statute does not mention "voting."

Huson, 404 U.S. 97, 108 (1971), *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969); *Allen* v. *State Board of Elections*, 393 U.S. 544, 571-572 (1969); *England* v. *Medical Examiners*, 375 U.S. 411, 422 (1964). The final factor is the impact retroactive application would have on the administration of justice and the integrity of the judicial process. *Linkletter* at 637.

When these three factors are applied to the facts and circumstances in the *Moody* case, it is clear that if this Court's decision should, which it should not, be to promulgate a new rule of appellate procedure that rule should not be applied to invalidate retroactively the rehearing *en banc* ordered in *Moody*.

The purpose of any new procedural rule can only be to improve the administration of justice. Translated to the issue raised here that purpose could only be to adopt a more effective process for the selection of appropriate cases for rehearing *en banc*. But *Moody* is now identified as a most appropriate case for *en banc* rehearing. It clearly involves issues of great public importance and reveals a deep cleavage of judicial thought applicable to those issues. What better case is there upon which to bring to bear the full authority of the court?

Furthermore, in *Moody*, but not in *Williams*, the parties have filed extensive briefs with the *en banc* court, oral argument has been held and a decision modifying the panel's decision on back pay has been, at least tentatively, reached. The injustice and hardship upon the litigants to now erase all their efforts is obvious. Moreover, the law in the Fourth Circuit will remain unsettled and speculative since it is now known that divergent results may be possible depending upon which judges may hear a future case.

Finally, in appellees' view the majority of the judges in active service on the Fourth Circuit can change their procedure for selecting cases for *en banc* rehearing whenever

hey wish. But to throw the "flag" after the play has resulted in a touchdown is not only unusual, but also a ittle injudicious.

For these reasons it seems clear that, even if this Court s compelled to announce a new procedural rule, at least in he case of *Moody* its application should be prospective only.

CONCLUSION

The question certified should be answered in the affirmative, thereby validating the *en banc* rehearing practice in the Fourth Circuit which allows senior circuit judges, who were members of the initial hearing panel, to vote on the question whether a case should be reheard *en banc*. If however, this Court reaches the opposite conclusion and answers the question certified in the negative, it should be ordered that such a decision is not to be applied to invalidate the rehearing *en banc* ordered and held in *Moody*.

Respectfully submitted,

ALBEMARLE PAPER COMPANY, DELAWARE
ALBEMARLE PAPER COMPANY, VIRGINIA
HOLLINGER WALLBOARD CORPORATION
ETHYL CORPORATION

By FRANCIS V. LOWDEN, JR.

FRANCIS V. LOWDEN, JR.
PAUL M. THOMPSON
JAMES A. JONES, III
Hunton, Williams, Gay
& Gibson
P. O. Box 1535
Richmond, Virginia 23212

GORDON G. BUSBICKER, ESQ.
Fargre and Benson
1300 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402

JULIAN R. ALLSBROOK, JR., ESQ.
Allsbrook, Benton, Knott,
Allsbrook & Cranford
Post Office Box 108
Kidd Building
Roanoke Rapids, North Carolina

CHARLES F. BLANCHARD, ESQ.
Yarborough, Blanchard, Tucker
& Denson
P. O. Drawer 30
Raleigh, North Carolina 27602

Counsel for Appellees

Dated: February 12, 1974

CERTIFICATE OF SERVICE

I, Frances V. Lawden, Jr., counsel for the Employer Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Employer Appellees in the United States Mail, first class postage prepaid, this 15th day of February, 1974, addressed to: Jack Greenberg, Esq., 10 Columbus Circle, New York, New York 10019; J. Levonne Chambers, Esq., East Independence Plaza, 951 S. Independence Blvd., Charlotte, North Carolina; Thomas F. Clayton, Esq., 307 W. Franklin Street, P. O. Box 236, Warrenton, North Carolina; Conrad O. Pearson, Esq., 203½ E. Chapel Hill Street, P. O. Box 1428, Durham, North Carolina; Warren Woods, Esq., Wilson, Woods & Villahon, Suite 1032, Pennsylvania Building, Pennsylvania Avenue & 13th Street, Washington, D. C. 20004; William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Virginia 23219.

FRANCIS V. LAWDEN, JR.
Counsel for Employer Appellees

APPENDICES

A LETTER APPENDIX

Letter from Mr. William K. Slate, II, dated January 25th, 1974

William K. Slate, II
Clerk

Telephone 643-5992
Area Code 703
Tenth and Main Streets
Richmond, Virginia 23219

January the Twenty fifth, 1974

F. V. Lowden, Jr., Esquire
Post Office Box 1538
Richmond, Virginia 23212

Re: En Banc Hearings

Dr. Mr. Lowden:

This letter is in response to yours dated January 23, 1974 regarding the above referenced subject.

It should be established from the outset that any "estimates" of how often Senior Judges Boreman and Bryan sit with this court, as well as the amount of caseload which they carry, would be just that - an estimate. Finite figures could only be secured by a case by case analysis of over 1600 cases processed during the last fiscal year. However, after discussing your inquiry with my staff, I do believe it would be fair to say that Judge Boreman sits during approximately two-thirds of the court's sessions. As a result he carries approximately two-thirds caseload. Senior Judge Bryan sits with the court during approximately three-fifths

of the court's sessions. He therefore carries approximately three-fifths caseload.

I am hopeful that the above information will be of assistance to you.

Sincerely,

/s/ William K. Slate, II
William K. Slate, II

Letter from Mr. William B. Luck, dated February 6, 1974, with the relevant portions of Ninth Circuit's General Order No. 15 enclosed:

Office of the Circuit Executive
United States Court of Appeals for the Ninth Circuit
P. O. Box 42068
San Francisco, California 94101

William B. Luck
Circuit Executive

February 6, 1974

F. V. Lowden, Jr., Esq.
Hunton, Williams, Gay & Gibson
700 East Main Street
P. O. Box 1535
Richmond, Virginia 23212

Dear Mr. Lowden:

Attached is a copy of this court's General Order No. 15 which is titled, "In Banc Hearings."

Sincerely yours,

/s/ William B. Luck
William B. Luck

WBL:mjg
attachment

U.S. Court of Appeals
Rev. 5/14/69
for the Ninth Circuit

General Order No. 15
In Banc Hearings

1. *Definitions.* As used herein, "hearing" means the initial hearing in this Court, whether by a panel or by the Court in banc. "Rehearing" means any subsequent hearing by the panel or by the Court in banc, whether or not an opinion has been issued and whether or not the initial hearing was by a panel or by the Court in banc.

2. *Panel recommendations for a rehearing in banc.* Should the panel to which a case has been assigned determine, *sua sponte*, or upon consideration of a suggestion by a party or of a member of the Court, or of a member of the panel, that the case should be reheard in banc or that the members of the Court in active service should decide whether the case should be so reheard, it shall: (1) send a memorandum to the Chief Judge so advising him, indicating why this course is appropriate, and shall provide him with a sufficient number of copies so that the Chief Judge may distribute the memorandum to all members of the Court in active service; (2) notify the Clerk that a proposal for a rehearing is under consideration and that the mandate should not issue unless and until he is so advised by the panel or the Chief Judge; and (3) supply the Chief Judge with a form of order, and copies thereof for like distribution, authorizing the withdrawal of the assignment of the case from the panel and providing for a rehearing in banc on a day to be fixed. The order shall also specify the question or questions with which the Court, in banc, will be particularly concerned, at the same time making it clear

that the Court will consider all issues involved. A panel should not ordinarily request a rehearing in banc unless and until the members of the panel have first expressed their views in the form of a proposed opinion or opinions.

5. Action upon panel recommendation for a rehearing in banc. Upon receipt of a memorandum and form of order of the kind described in subsection 2 of this General Order, the Chief Judge shall distribute copies thereof and call for a vote by written memorandum addressed to all judges entitled to vote thereon, or at a Court meeting. All available judges shall vote thereon, but no vote shall be cast until the expiration of five days in order to allow any judge who wishes to do so, to express his views on the matter.

If a majority of the members of the Court in active service and of any retired member of the Court who is on the panel in question agree upon an order of the kind described in subsection 2 of this General Order, the same shall be filed and the substance thereof, but not the vote thereon, shall be communicated to the parties, and the case shall be recalendared for in banc hearing. If such an order, proposed by a panel, is not agreed upon by a majority of the members of the Court in active service and of any retired member of the Court who is on the panel in question, the panel shall then determine what alternative course it shall follow and manifest the same by entry of a panel order or by a memorandum to the Clerk. In the event a party suggests a rehearing in banc, and a majority of the members of the Court in active service rejects the suggestion, this fact, but not the vote thereon, shall be noted in the panel order granting or denying the petition for rehearing.

• • •

B. STATUTORY APPENDIX

28 USC § 46:

"**§ 46. Assignment of judges; divisions; hearings; quorum**

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

"As amended Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331."

Rule 35 of the Federal Rules of Appellate Procedure:

"DETERMINATION OF CAUSES BY THE COURT IN BANC:

"(a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

"(c) **Time for Suggestion of a Party for Rehearing in Banc; Suggestion does Not Stay Mandate.** If a party desires to suggest a rehearing in banc, the suggestion must be made within the time provided by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate."

FEB 13 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-899

JOSEPH P. MOODY, ET AL., *Appellants*

v.

ALBEMARLE PAPER CO., ET AL., *Appellees*

BRIEF FOR TRADE UNION APPELLEE (HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO) IN RESPONSE TO THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPHY
1032 Pennsylvania Building
425 13th Street, N.W.
Washington, D.C. 20004

Of Counsel:

WILSON, WOODS & VILLALON
1032 Pennsylvania Building
425 13th Street, N.W.
Washington, D. C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
A. Introduction	2
B. The Proceedings and Decisions Below	3
The en banc rehearing	4
C. Certification	6
Summary of Argument	8
Argument	9
I. The Voting Procedure in Question Fully Satisfies the Criteria Established by This Court for the Exercise by the Court Below of Its En Banc Hearing Power	9
II. Concluding Considerations	17
Conclusion	20
Appendix A	1a
Statutes	1a
Rules	3a
Appendix B	6a
Certificate	6a

CITATIONS

Cases: Page

Allen v. Johnson, 5 Cir., 291 F.2d 527 ..... 21, 8a
Civil Aeronautics Board, et al. v. American Air Transport, et al., 344 U.S. 4 22
In Re Burnett, 350 U.S. 521 21
NLRB v. White Swan Co., 313 U.S. 23 21
Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 ..... 10, 14, 21
Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 ..... 9, 10, 12
U.S. v. American Foreign S.S. Corp., 363 U.S. 685, 688 ..... 10, 14
Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247 ..... 8, 10, 11, 12, 13, 14, 15, 21, 22
Williams v. Albemarle City Board of Education 8a
Zahn v. International Paper Co., 2 Cir., 469 F.2d 1033, 1042 ..... 21, 8a

Statutes and Rules:

Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* 2
28 U.S.C. 46 ..... 2, 9, 10, 11, 12, 13, 14, 15, 19, 1a, 2a
28 U.S.C. 2101(b), (c) and (e) 2, 1a, 2a
28 U.S.C. 2281 ..... 2, 19, 2a
28 U.S.C. 1254(2) 2, 21, 3a, 6a
Rule 23, Federal Rules of Appellate Procedure 2, 19, 3a, 4a, 7a
Rules Supreme Court of the United States, Part VI
Rule 23(1) 2, 3, 4a, 5a
Rule 23(2) 2, 3

Miscellaneous:

En Banc Hearings In The Federal Courts of Appeals: Accommodating Institutional Responsibilities, 49 N.Y.U.L. Rev. 461 (1965) 10, 14, 19
En Banc Procedure In The Federal Courts of Appeals, 111 U. Pa. L. Rev. 329 (1963) 10, 15
Stern and Gressman, *Supreme Court Practice* (4th Ed.), BNA 1969 21

IN THE

Supreme Court of the United States

No. 73-889

James P. Mooney, et al., *Appellants*

v.

Albemarle Paper Co., et al., *Appellees*

BRIEF FOR TRADE UNION APPELLEE (HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO) IN RESPONSE TO THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinions of the court of appeals is reported at 4 F.2d 134. The opinion and order of the District Court for the Eastern District of North Carolina, at Raleigh, are reported at 4 FEP Cases 561. The communication from the court below, transmitting the certified question together with a two-page amplification, was received by this Court on December 7, 1973; is reproduced herein as Appendix B, *infra*, pp. 6a-

JURISDICTION

By order of this Court, entered January 14, 1974, the parties were granted leave and invited to file briefs by February 13, 1974, in response to the question certified by the court below, pursuant to 28 U.S.C. 1254 (3).

QUESTION PRESENTED

Under 28 U.S.C. 46 and Rule 35 of the Federal Rules of Civil Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?

STATUTES INVOLVED

Set forth in the Appendix A *infra* (pp. 1a-4a) is the pertinent text of the following statutes: 28 U.S.C. 1254 (3), 62 Stat. 928; 28 U.S.C. 46 (c), 77 Stat. 331; 28 U.S.C. 294(b), (c), and (e), 71 Stat. 495, 497; 28 U.S.C. 296, 72 Stat. 850.

Also involved is Rule 35, Federal Rules of Appellate Procedure (promulgated pursuant to Sec. 2, Order of the Supreme Court, dated December 4, 1967) and Rules of the Supreme Court, Part VI, Rules 28 and 29, effective October 2, 1967. (App. A, *infra*, pp. 4a-6a).

STATEMENT

A. Introduction

The question certified by the court below does not present, by any recognized standard, "a question or proposition of law"; nor does it, by the same token, bear an intrinsic relationship to the substance or merits of the action—grounded upon alleged violations of Federal statute—at the district court or cir-

cuit court of appeals level. Rather, as stated by Chief Judge Clement F. Haynesworth in his transmittal, the certified question "in issue" is one concerning "the duties and responsibilities of some of the judges of the court", whose "relative powers of participation are at stake" (App. B, 8a).

Our understanding of the procedural status of the question certified, is that it is presently undergoing "preliminary examination" by the Court (Supreme Court Rule 29(2)), which has not, at this juncture, invoked its certification jurisdiction, premised, as the Rules stipulate, upon consideration of "a question or proposition of law" as to which a court of appeals "desires instruction for the proper decision of a cause" (*id.*, Rule 28(1)).

Nevertheless, the manner in which the generic question raised by the court below is ultimately resolved will prove "crucial," as stated by Judge Haynesworth, to its final disposition of the *Moody* case.[1] We, therefore include by way of background, a capsulization of the proceedings below.

B. The Proceedings and Decisions Below

In November, 1971, the district court concluded, in a class action suit brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.), that the seniority system of the Albemarle Paper Company, at its Roanoke Rapids, North Carolina plant, operated to continue the effects of past discrimination which had not been eradicated, and

[1] Since we represent Halifax Local No. 29, United Papermakers and Paperworkers, AFL-CIO the Union appellee in *Moody* only, this brief is addressed solely to the implications of the question certified for that case.

ordered it restructured, with the substitution of plant for job seniority. The district court denied the plaintiffs' request for an award of back pay to the class, on multiple grounds including corrective action taken over the years and prejudice to the employer and union defendants resulting from the belated assertion of a monetary claim nearly five years after institution of the action, and following an earlier disclaimer on the score. The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non discriminatory.

On appeal of the testing and back pay rulings, a majority of the three member panel of the court below, on February 20, 1973, reversed the district court on both issues. Designated and assigned to the panel were the court's two retired or senior judges, Boreman and Bryan, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal and, correspondingly, a different senior judge dissented on each of the two issues. Thus (1) on the testing procedures issue, Judges Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

The en banc rehearing

The Union took no part in the argument on the testing issue, a management prerogative outside the scope of conventional collective bargaining. With respect to the back pay, separate opinions were filed by

each of the three judges on the panel—opinions that differed demonstrably on the principles of law and statutory construction that should govern review of the exercise of discretion on this score, vested in the trial judge under the statute. Senior Judge Bryan filed a brief concurring opinion in joining Judge Craven in the majority reversal on the back pay issue, while Judge Bowman, who presided at the argument, filed a lengthy dissent, which included a comprehensive analysis of the court's prior decisions on the subject as well as the rationale underlying Judge Craven's majority opinion.

The Union, on March 6, 1973, filed a petition for rehearing solely on the back pay issue, with suggestion for rehearing *en banc*, and did the Company but with respect to both the back pay and job testing issues. The Union contended in its petition that the majority opinion on the back pay question introduced entirely novel concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a result and holding that marked a wide departure from the settled principles theretofore endorsed by the court below and the other circuit courts of appeals. The Union urged further that the majority opinion, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and contrary to the statutory concept placed back pay on a mandatory basis.

On June 25, 1973, the court below, through Chief Judge Haynesworth, entered an order granting the petitions for rehearing en banc, with the statement that "a majority of the judges in regular active

service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions".

Following the filing of supplemental briefs[2] all parties participated in oral argument at the *en banc* rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below.

C. The Certification

The *en banc* court below withheld issuance of its decision, notwithstanding that "the tentative vote is that it will modify the panel decision with respect to an award of back pay" (App. B, 7a).

It was apparently after the tentative vote was taken that retroactive doubts were raised with respect to the eligibility of Senior Judges Boreman and Bryan to vote on the threshold question of whether a rehearing *en banc* should have been granted. Each "voted for it", although "a majority of the judges in regular active service did not". However, the "votes of the two senior judges were counted providing a majority of the counted votes in favor of rehearing *en banc*". Certificate, App. B, 7a. As Chief Judge Haynsworth explained

> "The custom has been to count the votes of senior circuit judges who were members of the initial

[2] While both the appellants and the Equal Employment Opportunity Commission as *amicus curiae* (joined at this turn by the Department of Justice), filed extensive supplemental briefs on the merits for the *en banc* rehearing, neither raised any objection then or subsequently, to the voting procedure announced by the court below in its rehearing order.

hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the en banc court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule . . ."

The execution of the Certificate received by this Court December 7, 1973, was "authorized by the two senior judges and by all of the judges in regular active service" (*ibid.*).

SUMMARY OF ARGUMENT

The controlling decision of this Court in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953), interpreting 28 U.S.C. 46(c), establishes the broad frame of reference for assessing *en banc* procedures in the courts of appeals and is fully dispositive of the issue here. The custom of the court below, permitting a senior judge who was a member of the initial hearing panel to vote in the determination of whether the case should be reheard *en banc*, represents a proper exercise of the wide discretion vested in the courts of appeals in deciding how their *en banc* power may be called into play. So long as the majority of the active judges, referred to in 28 U.S.C. 46(c), retain the ultimate power to revise the procedure they have devised, they may delegate the responsibility for determining whether an *en banc* rehearing shall be held to divisions of the court; or they may adopt other techniques for the initiation of *en banc* power suitable to the needs of the particular court of appeals.

In this analysis, the statutory command that *en banc* rehearings shall be "ordered" by a majority of the active judges, is not synonymous with a command that such rehearings shall be "voted" *per se* by a majority of the active judges.

Following the development of a diversity of *en banc* practices by the various courts of appeals, this Court reaffirmed the doctrine of *Western Pacific* and the principle of non interference in the internal administration of the courts of appeals, and the necessity of intramural determination by each court of the *en banc* questions.

The *en banc* voting practice in question accords to senior judges sitting by designation, the full powers envisaged by 28 U.S.C. 296, and facilitates their contribution to the efficient operations of the court below and reduction of its case load. The competency of a senior judge on the initial panel to likewise serve as a member of the *en banc* court on rehearing, is still another factor which enhances the reasonableness of this practice. These are additional reasons why the court below acted well within the ambit of its discretionary power relating to matters of internal administration and housekeeping functions.

Additionally, because the question certified is not a question or proposition of law, as contemplated by Section 28 U.S.C. 1254(3), the certificate should be dismissed.

ARGUMENT

I

The Voting Procedure in Question Fully Satisfies the Criteria Established by This Court for the Discretionary Exercise by the Court Below of Its En Banc Hearing Power

The unequivocal answer to the question certified, we believe, is in the affirmative, in the light of the parameters clearly defined by this Court for the proper exercise by the circuit courts of appeals of their inherent *en banc* hearing power, placed on a statutory basis by 28 U.S.C. 46(*c*). Accordingly, no intervention by this Court is required.

Conversely, appellants urge that when the statute directs that *en banc* rehearings be "*ordered* by a majority of the judges . . . in regular active service", this must be taken to mean that only active judges "are competent to *vote* on a suggestion of rehearing *en banc*" (Memorandum of Appellants, tendered December 27, 1973, p. 7, emphasis supplied). Put simply, appellants would substitute for the key statutory word "ordered" by a majority of the active judges, their own concept "voted" by a majority of the active judges. This is a kind of legerdemain which, in our view, finds no support in—and, indeed, is precluded by—the governing decisions of this Court, to which we now turn.

Historically speaking, the emergence of *en banc* proceedings in the circuit courts of appeals is a relatively recent development. It was not until *Textile Mills Secur. Corp.* v. *Commissioner*, 314 U.S. 326, that

this Court had occasion in 1941 to sustain the pow
of a court of appeals to order a rehearing *en banc*

Following Congressional codification of the *Textile Mills* decision in Section 46(c) of the Judicial Co of 1948, this Court, in 1953, utilized its supervisor power over the federal judiciary to establish the bas frame of reference and "fundamental requirements for *en banc* procedures in the courts of appeal *Western Pacific RR. Corp.* v. *Western Pacific R.* 345 U.S. 247, 260. We submit that this landmark d cision—the doctrine of which was reiterated with a proval in both *U.S.* v. *American Foreign SS. Cor* 363 U.S. 685, 688 (1960) and *Shenker* v. *Baltimore Ohio Railroad*, 374 U.S. 1, 4-5 (1962)—is fully di positive of the issue here.

The two decades that have elapsed since the issuan of the *Western Pacific* decision have seen no questio raised as to the continuing and current validity of t guidelines which the Court first articulated there.

[3] While by 1938, all but two of the eleven circuits had more th three circuit judges, because of the three judge provision of S tion 117 of the Judicial Code, only the District of Columbia C cuit Court of Appeals ever sat with more than three judges. Me while a panel of the seven judge Ninth Circuit had held th Section 117 precluded a court of more than three. However, t Court agreed with the contrary view of the Third Circuit, th this objection was outweighed by the "avowed purpose" of S tion 117 to create courts consisting of all the active judges the Circuit, and thus with power to hear and decide cases *en ba Textile Mills Secur. Corp.*, *supra*, 314 U.S. at 331-35; En Ba Hearings In The Federal Courts of Appeals: Accommodating In tutional Responsibilities, 40 N.Y.U.L. Rev. 564, 570-572 (196 En Banc Procedure In The Federal Courts of Appeals 111 U.Pa Rev. 220 (1962).

In *Western Pacific*, the Court considered the petitioners' claim that 28 U.S.C. 46 (c),[1] established their right to ask for a rehearing *en banc* on which "the court as a whole must act" by insuring that every active judge ruled formally on the question whether the case should be accorded a rehearing *en banc*.[2] Rejecting petitioners' argument, the Court held that the statute established no right in the litigants, and is "addressed" not to them but rather to the court of appeals, "which is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing". 345 U.S. at 250.

In short, the Court, after an extensive review of the legislative history (345 U.S. at 251-259), declared that while the statute in question "vests in the court the power to order hearing *en banc*", Congress intended that "the determination of how the *en banc* power was to be exercised was to rest with the court itself . . .". In evaluating the Revisers' Notes, as "entitled to great weight", the Court noted that they "assimilated the power to sit *en banc* to the power to discharge these

[1] Set forth in App. B, as amended November 13, 1963, with the addition of the following sentence:

> "A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof."

[2] In writing for the Court, Chief Justice Vinson observed: "The factual background on which petitioners' complaint is based is as complicated as it is unique. For present purposes, we may pass over it." 345 U.S. at 249.

housekeeping functions" [of the courts of appeals] and it was precisely that description of the power which the Revisers saw fit to use in ascribing to Congress what they deemed to be the nature of the power conferred by 46 (c)". 345 U.S. at 256.

A distinctive feature of the *Western Pacific* case, of singular importance to our thesis here, was the particular mode employed by the court of appeals (for the Ninth Circuit) in exercising its *en banc* power. The technique there utilized was a delegation of authority to the three-judge panel or division to which the case was initially assigned, to dispose finally of petitions for rehearing *en banc*. It is noteworthy also that "[T]he judges on the panel were distinct judges", sitting by designation.

"Consistent with the statute", this Court held, it was proper to "delegate the responsibility for the initiation of *en banc* power to the divisions of the court" under 28 U.S.C. 46(c), so long as "the majority of the active circuit judges . . . always retains the

---

[6] As detailed in the *Textile Mills* case, *supra*, 314 U.S. at 332:

"There are numerous functions of the court, as a 'court of record, with appellate jurisdiction,' other than hearing and deciding appeals. Under the Judicial Code these embrace prescribing the form of writs and other process and the form and style of its seal (28 U.S.C. § 219); the making of rules and regulations (28 U.S.C. § 219); the appointment of a clerk (28 U.S.C. § 221) and the approval of the appointment and removal of deputy clerks (28 U.S.C. § 222); and the fixing of the 'times' when court shall be held (28 U.S.C. § 223). Furthermore, these various sections of the Judicial Code provide that each of these functions shall be performed by the court."

"This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc." 345 U.S. at 255, fn. 13.

power to revise the procedure and withdraw what ever responsibility may have been delegated to the divisions". 385 U.S. at 261.

Thus the teaching of *Western Pacific*, accorded extraordinary emphasis in the opinions, is that since "§ 46 (c) is a grant of power and nothing more, each Court of Appeals is vested with a wide latitude of discretion to devise for itself how that power shall be exercised", consideration of it, the Court ruled, is "premature that may be called into play by any procedure ever presented to the courts". 385 U.S. at 259.

In the same vein, Justice Jackson,* relied on by petitioners that "the whole practice on the subject [of *en banc* rehearings] is best left to each Court of Appeals" and, in view of the "diversity of practices", that "both wisdom and feasibility would be served by leaving this problem to the solutions from time to time suggested to each circuit by its own experience". 385 U.S. at 274-275.

Finally, we would stress that the Court in *Western Pacific* pointed to and avoided the pitfall to which appellants' analogously restrictive rereading of the statute (*supra*, p. 9) would lead. For there we have the Court said: (385 U.S. at 259)

> "A first reading of § 46 (c) may well leave one with doubts. It empowers power in 'a majority of active circuit judges,' and says no more. For

* The "fundamental requirements" spelled out by the Court related primarily to establishment of a limited right of litigants to participate in the initiation of the *en banc* procedure: first, the litigant should be permitted to suggest to the judges the appropriateness of his case for *en banc* hearing or rehearing; and second, the court should make its *en banc* procedure known to litigants (385 U.S. 261-68).

* Justice Jackson filed a dissent on other technical and unrelated grounds (385 U.S. at 275-277).

large, without further study, one might be inclined to fall back upon the general experience of our jurisprudence, and determine that the litigant is, by implication, given the right to compel the full court to determine whether it will exercise its power in a given case. But a study of the legislative background of § 46 (c) dispels such an idea and makes it quite clear that the draftsmen intended to grant the *en banc* power and no more; the court itself was to establish the procedure for exercise of the power."

As we have indicated, the Court has had more recent occasions to specifically endorse the views expressed in *Western Pacific* in declaring that the *en banc* "questions is largely to be left to intramural determinations by each of the Courts of Appeals" (*United States v. American Foreign S.S. Corp.*, 363 U.S. 685, 698 (1960)), because for "this Court to hold otherwise would involve it unnecessarily in the internal administrations of the Courts of Appeals" (*Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 5 (1963)).

In two major research projects on the subject conducted independently of each other ten years or more after *Western Pacific*, both authors, in their published findings based on questionnaires addressed to the Chief Judge and other judges of the federal circuit courts of appeals, appear to agree that because "the Supreme Court and Congress have continued to leave exercise of the power to sit *en banc* with the circuit judges, a variety of *en banc* procedures and standards for deciding when to sit *en banc* has developed among the circuits". Ira Haas Hemmings, In The Federal Courts of Appeals: Accommodating Institutional Responsibilities, 40 N.Y.U.L. Rev. 561, 574 (1965). The wide spectrum of innovative procedures that the courts of

peals have evolved on an empirical basis to meet their own particular needs, is surveyed in the other of the two studies to which we have reference. En Banc Procedure In The Federal Courts Of Appeals, 111 U. Pa. L. Rev. 230, 222-227 (1962).

It is against the background we have traced that the propriety of the *en banc* voting procedure devised by the court below may be assessed. There were no *en banc* problems to concern the court below as late as 1962, when the total number of judges on the court had "only recently increased from three" to five.* Apparently, the "custom" of counting the votes of the senior judges who sat on the initial hearing panel when the court was polled on the question of *en banc* rehearing, was geared to the 1963 revision of 28 U.S.C. 46 (c), declaring such senior judges "competent to sit" on the court conducting the *en banc* rehearing (App. 15, fn.). This new found authorization for senior judges under these circumstances apparently supplied the rationale for the practice, which was therefore "thought reasonable" by the members of the court below, until the present qualms arose.

There is one more factor in the equation which merits attention at this point. The "custom" in question could have been devised and set in motion only by the choice and on the volition of the judges in regular active service, whose prerogative as pointed out in *Western Pacific*, *supra*, pp. 11-13 it was and is to discharge this function, among others. It follows that their prerogative likewise is to alter this practice at will.

*"Letter from Hon. Simon Sobeloff, Chief Judge, Court of Appeals for the Fourth Circuit, Dec. 27, 1961." En Banc Procedure in The Federal Courts, *supra*, at 221, fn. 13

For these reasons, we submit, the custom of the court below vis-a-vis the *en banc* votes cast by senior judges who were members of the initial hearing panel, is fully consonant with the standards and "fundamental requirements" set forth in *Western Pacific* for the guidance of the courts of appeals. Nor, as we have suggested, is there any interdiction of this voting procedure to be found in either the controlling statute (28 U.S.C. § 46(c)) or in implementing Rule 35, Federal Rules of Appellate Procedure.[10]

Moreover, the custom under consideration appears to further both the letter and spirit of 28 U.S.C. 296, which provides that a senior judge, sitting by designation and assignment, "shall have all the powers of a judge of the court . . . to which he is designated and assigned . . .". Significantly, the only judicial powers withheld in this sweeping statutory grant are the inconsequential ones of appointing "any person to a

[10] As there stated in the Notes of Advisory Committee on Appellate Rules:

"Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in Western Pacific R.R. Corp. v. Western Pacific R.R. Co., 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings sua sponte.

"The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See Western Pacific R.R. Corp. v. Western Pacific R.R. Co., *supra*, 345 U.S. at 262, 73 S.Ct. 656."

statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices" (App. B, 2a).

Finally, it will be recalled that in *Western Pacific*, the large area of discretion left to the courts of appeals included, as in that case, sanctioning the delegation of authority to the initial hearing panel to decide the question of whether a rehearing *en banc* should be granted; it will be recalled also that on the initial panel in *Western Pacific*, there were two district judges sitting by designation. (*supra*, p. 12) The Court's only proviso, as we have noted, is that the full court retain the authority to revise the *en banc* procedure and to withdraw the delegated power. Surely, by comparison, the court below has accorded a far more limited role to senior judges of the initial panel, in permitting them to vote on the question of *en banc* rehearing *along with the entire roster of active judges.*

In this analysis, we fail to understand how appellants can fault the practice of the court below on the basis of either reason or authority.

II

Concluding Considerations

While we believe the foregoing discussion sufficient to cogently support our case, it may, nevertheless, prove useful to touch upon additional factors which throw further light upon the question certified by the court below. Also, we shall deal briefly with the major contentions advanced by appellants, which we regard as untenable or misleading at best.

To begin with, the Court is acutely aware of the burgeoning caseload confronting the Federal court

system at all levels. Indeed, by way of pertinent illustration, the very statute under which the *Moody* complaint was filed in the district court, is itself accountable for the introduction of a sizeable volume of new cases."[17]

As pointed out in the Brief filed by the Company herein, the contribution made over the years by Senior Judges Boreman and Bryan in coping with the workload of the court below is an impressive one, and, indeed, may find a parallel among senior judges in other circuits. During the months in which they sit, each carries the full burden of a circuit judge, with Judge Boreman sitting during approximately two-thirds of the Court's sessions and Judge Bryan approximately three-fifths of the time. Thus, during such periods, they dispose of caseloads approximately by two-thirds and three-fifths respectively, that of an active judge in regular service.[18]

Coupled with this degree of continuing participation, these veteran senior judges may be safely as-

[17] The 1972 Amendments to Title VII, Civil Rights Act of 1964, *supra*, not only gave the Equal Employment Opportunity Commission greatly expanded coverage extending the Commission's protective jurisdiction from 60 to 80 million employees, but accord the Commission power, after exhausting conciliation, to file a civil action in Federal district court and to represent the charging party in the action. Upon the advent of the Amendments, the then Commission Chairman, with an augmented budget permitting the hiring of a large number of additional employees, was quoted as saying that his agency was preparing to generate Federal court cases at the rate of "perhaps 10 to 15 cases every two weeks." *The Christian Science Monitor*, July 12, 1972, p. 3.

[18] Letter from William K. Slate, II, Clerk of the court below, dated January 25, 1974, appended as an exhibit to the Company's Brief.

sumed to be cognizant of the structure of Rule 35, Federal Rules of Appellate Procedure, against *en banc* rehearings which should be restricted to the necessity of securing or maintaining "uniformity of . . . decision" or to a "question of exceptional importance" (App. B, 3a).

Added to these considerations is the unique insight and knowledgeability derived from having served on the panel that decided the particular case. Equally consequential, is the fact that the senior judge will sit on the *en banc* court, if one is convened.

Putting aside for the moment the central question under consideration, it would be reasonable to conclude, on the basis of the foregoing factors, that the services volunteered by Senior Judges Boreman and Bryan contribute materially to the efficiency and effectiveness of the court below in its ongoing operations. That being so, the voting status given these senior judges (on the infrequent occasions when the full court is polled on a suggestion of rehearing *en banc* regarding a case they heard initially) enhances their usefulness, utilizes their expertise, and accords them the full "power" called for by [illegible] [illegible]

The point we would make, therefore, is that the "custom" to which the court below has adhered, is a wholly reasonable exercise of its discretionary *en banc* power, effectuated, in accord with Section 46(c), by expression of the majority will of the judges in regular active service.

[illegible] In the year 1961 "at least two of every five panels in the courts of appeals included a judge who was not an active judge of the circuit." Ex Parte Hearings on the Federal Courts of Appeals, *supra*, at 570.

These same considerations render baseless appellants' apprehensions that the senior judges, by thus being permitted to vote on the question of *en banc* rehearing, will thereby encroach on the "general responsibility" vested in the active judges and their "continuing duty to develop and apply the law in cases that will be adjudicated in the future" (Memorandum of Appellants, *supra*, pp. 11-12). It must be borne in mind that the senior judges' vote is counted only in the special circumstances described, and that he does not, in any event, participate in the determination of *hearings en banc* as distinguished from *rehearings en banc*. It must be remembered further that as a designee on the initial panel, the senior judge (or senior judges as here) will be a member of the *en banc* rehearing court in any event, as authorized by statute, and will be strongly outnumbered for decisional voting purposes by the full court of active judges.

How, it may be asked, can he accomplish the interference appellants fear, by simply casting a vote in the first instance, again along with all of the active judges, on the question of whether or not the case should be reheard *en banc*?

Appellants also assert that "the Fourth Circuit's custom contravenes . . . good policy". While we think that precisely the contrary proposition is true, were that the case, it ill behooves appellants, or advocates on either side of this case for that matter, to address the question of public or judicial "policy". The matter falls within the exclusive province of a courts' discretionary power in the field of judicial administration, as distinguished from the exercise of the (nonarbitrary) discretion that is required in the adjudication of certain cases. If this is an area where even this

Court is loath to intrude, as we have seen, still less is it permissible for litigants to seek to do so.

Finally, while appellants argue otherwise (Memorandum of Appellants, *supra*, pp. 9-10), it is of no consequence whether the practice of the other courts of appeals parallels or differs from that of the court below. This Court has spoken. *Western Pacific* contemplated just such a "wide latitude of discretion" and "diversity of practices" (*supra*, p. 13). When the Court reaffirmed this approach many years later in *Shenker*, just such a diversity was the order of the day in the various courts of appeals (*supra*, p. 14), a situation about which the Court may be presumed to have been fully aware."

Accordingly, we urge that the certificate be dismissed. The certification procedure of 28 U.S.C. 1254(3), has rarely been invoked by the courts of appeals and even more rarely has this Court granted certification in its entire history. *Supreme Court Practice* (4th Ed.) Robert L. Stern and Eugene Gressman, BNA 1969, Chapter 9, "Certified Questions" pp. 386-389; *In re Buswell*, 350 U.S. 521 (1956); *N.L.R.B.* v. *White Swan Co.*, 313 U.S. 23. The instant certificate, we are informed, is the first to be received by the Court in some ten years. Involving as it does the internal procedures of the court below, it is not of the genre contemplated by the certification statute.

"The *en banc* practice of the court of appeals for the Ninth Circuit is apparently consistent with that of the court below. The inconsistent data in *Zahn* v. *International Paper Company*, 469 F.2d 1033, 1041 n.2 (2d Cir. 1972) and *Allen* v. *Johnson*, 391 F.2d 527, 532-533 (3d Cir. 1968), is contrary to the doctrine of *Western Pacific*, beyond this, it is not a matter of concern for the reasons stated above.

This is all the more true, when the impact of W
Pacific is brought to bear.

CONCLUSION

The certificate should be dismissed with th
curiam statement that it lies with the court be
resolve the question certified. Cf., *Civil Aeron
Board, et al.* v. *American Air Transport, et a*
U.S. 4 (1952).

Respectfully submitted,

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPH
Suite 1032
Pennsylvania Building
425 13th Street, N.W.
Washington, D.C. 2000
Attorneys for Appellee U

Of Counsel:

WILSON, WOODS & VILLAIRSN
Suite 1032, Pennsylvania Building
425 13th Street, N.W.
Washington, D. C. 20004

February 13, 1974

APPENDIX

APPENDIX A

STATUTES

28 U.S.C. § 46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

As amended Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331.

28 U.S.C. § 294. Assignment of retired Justices or judges to active duty

* * *

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior

judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(e) No retired Justice or judge shall perform judicial duties except when designated and assigned.

As amended July 9, 1956, c. 517, § 1(c), 70 Stat. 497; Aug. 29, 1957, Pub.L. 85-219, 71 Stat. 495; Aug. 25, 1958, Pub.L. 85-755, § 5, 72 Stat. 849.

28 U.S.C. § 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the

consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. § 1254. Courts of appeals: certiorari: appeal: certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

RULES

Rules of Appellate Procedure

Rule 35. Determination of causes by the Court in banc

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision

sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Rehearing in Banc; Suggestion does Not Stay Mandate. If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rules Supreme Court United States

PART VI. JURISDICTION OF CERTIFIED QUESTIONS.

28.

QUESTIONS CERTIFIED BY A COURT OF APPEALS OR BY THE COURT OF CLAIMS.

1. Where a court of appeals or the Court of Claims shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or proposition of law may be certified, and they must be distinct and definite.

2. If in a cause certified by a court of appeals it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up, so that it may consider and decide the entire matter in controversy.

3. Where application is made under the preceding paragraph for direction that the entire record be sent up, the

application must be accompanied by a certified copy thereof.

PROCEDURE IN CERTIFIED CASES.

1. When a case is certified, the certificate itself constitutes the record. The clerk will upon receipt thereof from the court below notify the appellant in the court of appeals, or the plaintiff in the Court of Claims, who shall thereupon pay the docket fee, after which the case will be placed on the appellate docket. If the appellant or plaintiff fails to pay the fee, the appellee or defendant may do so. The appearance of counsel for the party paying the fee shall be entered at the time of payment.

2. After docketing, the certificate shall be submitted to the court for a preliminary examination to determine whether the case shall be set for argument or whether the certificate will be dismissed.

3. Any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

4. Briefs on the merits in cases on certificates shall comply with Rules 39, 40, and 41, except that the brief of the party who was appellant or plaintiff below shall be filed within forty-five days of the order setting the case down for argument.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, AND ARTHUR MITCHELL, *Appellants*,

v.

ALBEMARLE PAPER COMPANY, a Virginia corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, AND HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware corporation, HOERNER WALDORF CORPORATION, a Delaware corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia corporation, *Appellees*.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

No. 73-1479

BAXTER K. WILLIAMS, ALBEMARLE EMPLOYMENT COORDINATING COMMUNITY DEVELOPMENT ASSOCIATION, an unincorporated association, and the North Carolina Teachers Association, a corporation, *Appellees*,

v.

THE ALBEMARLE CITY BOARD OF EDUCATION, a public body corporate, *Appellant*.

Certificate

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28 U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a members of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc?*

The question is of determinative importance in each of the cases.

In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay.

In *Williams*, one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc*, he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the suggestion will fail by an equal division of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose. The panel has reversed an award of damages by the district court, but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal, probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges

who were members of the initial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-32, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *The Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

/s/ CLEMENT F. HAYNESWORTH, JR.
Clement F. Haynesworth, Jr.
Chief Judge,
Fourth Judicial Circuit

FILED
FEB 13 19
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-899

JOSEPH P. MOODY, *et al.*,

—vs—

ALBEMARLE PAPER COMPANY, *et al.*

BAXTER K. WILLIAMS, *et al.*,

—vs—

ALBEMARLE CITY BOARD OF EDUCATION.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR MOODY, ET AL., AND WILLIAMS, ET AL.

CONRAD O. PEARSON
203½ E. Chapel Hill Street
Durham, North Carolina

THOMAS T. CLAYTON
307 W. Franklin Street
Warrenton, North Carolina

Of Counsel

ALBERT J. ROSENTHAL
435 West 116th Street
New York, N.Y. 10025

J. LEVONNE CHAMBERS
ROBERT BELTON
East Independence Plaza
951 S. Independence Blvd.
Charlotte, North Carolina 28202

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
MORRIS J. BALLER
BARRY L. GOLDSTEIN
JOSEPH P. HUDSON
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Moody, et al., and Williams, et al.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Question Presented 3

Statement 3

ARGUMENT 6

I. The Language and Legislative History of the Applicable Provisions Exclude Senior Judges From Voting 6

II. Compelling Policy Reasons Deriving From The Purpose And Nature of *En Banc* Hearings, The Status of Senior Judges, And The Need For Consistent Appellate Practice Support The Plain Language of The Statute and Rule 10

1. The Purpose of *En Banc* Hearings and the Status of Senior Judges 10

2. The Policy of Uniformity 13

CONCLUSION 17

Appendix A—Certificate of the United States Court of Appeals for the Fourth Circuit A-1

Appendix B—Results of Survey of Practices in the Various Circuits B-1

Table of Authorities

Cases: PAGE

Allen v. Johnson, 391 F.2d 527 (5th Cir. 1968) 12, 15

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 3

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) 13

Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973) 1, 4

Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1 (1963) 14

Textile Mills Security Corp. v. Commissioner, 314 U.S. 326 (1941) 6

United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960) 7, 10, 11, 14, 16

Western Pacific Railway Corp. v. Western Pacific Railway Co., 345 U.S. 247 (1952) 14

Williams v. Albemarle City Board of Education, 485 F.2d 232 (4th Cir. 1973) 2, 4

Zahn v. International Paper Co., 469 F.2d 1032 (2nd Cir. 1973), aff'd on merits 94 S.Ct. 505 (1973) 15, 16

Statutes and Rules:

28 U.S.C. §43(b) 11

28 U.S.C. §46(c) 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17

28 U.S.C. §294(c) 11

28 U.S.C. §295 12

PAGE

28 U.S.C. §1254(3) 2

28 U.S.C. §1292(b) 13

28 U.S.C. §2284 13

42 U.S.C. §1983 3

42 U.S.C. §2000e *et seq.*, Title VII, Civil Rights Act of 1964 3

Federal Rules of Appellate Procedure, Rule 35 ..... 2, 3, 7, 9, 12, 13, 15, 16, 17

Rule 35(a) 9

Rule 35(b) 9

Federal Rules of Appellate Procedure, Rule 47 16

P.L. 88-176, 77 Stat. 331, "Judges—Status After Retirement" (1963) 7, 8

Other:

Advisory Committee Note to F.R.A.P. Rule 35, 43 F.R.D. 61 (1967) 9

House of Representatives Report No. 95, 88th Cong., 1st Sess. (1963) 8

Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U.L. Rev. 562 (1965) 11

Senate Report No. 596, 88th Cong., 1st Sess. (1963) 8

United States Code Cong. & Administrative News, 88th Cong., 1st Sess. (1963) 8

United States Court of Appeals Local Rules PAGE

First Circuit Rule 16 14

Third Circuit Rule 2(3) 15

Eighth Circuit Rule 7 15

Ninth Circuit General Order No. 15 15

In the

Supreme Court of the United States

October Term, 1973

No. 73-899

Joseph P. Moody, *et al.*,

—vs.—

Albemarle Paper Company, *et al.*

Baxter K. Williams, *et al.*,

—vs.—

Albemarle City Board of Education.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR MOODY, ET AL., AND WILLIAMS, ET AL.

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit are as follows:

1. The opinions of the panel in the *Moody* action, entered February 20, 1973, reported at 474 F.2d 134.

2. The opinion of the panel in the *Williams* action, entered October 1, 1973, reported at 485 F.2d 232.

3. The Certificate of the Court of Appeals, filed December 6, 1973, unreported. (The Certificate is set out in the Brief Appendix, A. 1-2.)

Jurisdiction

The Certificate of the Court of Appeals was entered on December 6, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(3). On January 14, 1974, this Court granted leave to, and invited the parties to, file briefs on the certified question on or before February 13, 1974.

Statutory Provisions Involved

This matter involves 28 U.S.C. §46, which provides, in relevant part, as follows:

> (c) Cases and controversies shall be heard and determined by a court of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the judges of the circuit who are then in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

The case also involves Rule 35 of the Federal Rules of Appellate Procedure, which provides in relevant part:

> (a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in

regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

Question Presented

The question certified by the Court of Appeals for the Fourth Circuit in these cases is:

> Under 28 U.S.C. §46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be heard *en banc*?

Statement

A. The *Moody* case is a class action attacking systemic practices of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* The case arose at a paper manufacturing mill, and centers on

allegations that the defendants engaged in employment discrimination by utilizing unnecessary testing and educational requirements and maintaining a "lock-in" seniority system. The plaintiff class seeks injunctive relief and a compensatory back pay award.

The district court found discrimination in the seniority system and the educational requirements, but held the testing program lawful under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and denied back pay in the exercise of its discretion. On appeal, a panel of the Fourth Circuit consisting of Judge Craven and Senior Judges Boreman and Bryan reversed the district court's testing ruling, finding the testing program not demonstrably job-related, and also reversed the denial of back pay, holding that the trial court's discretion had been abused. 474 F.2d 134.

On June 25, 1973 the Court of Appeals granted the defendants' petitions for rehearing and ordered rehearing *en banc*. After filing of supplemental briefs by all parties, the Court *en banc*, including Judges Boreman and Bryan, heard oral argument on October 2, 1973. The problem raised by the Certificate intervened before any decision of the *en banc* Court on the merits could be reached.

B. *Williams*, a black high school principal's employment discrimination action brought under 42 U.S.C. §1983, arose in the context of the desegregation of a dual school system. The plaintiff lost his job during the desegregation process. The district court found that he had suffered racial discrimination, and the panel of the Court of Appeals, including Senior Judge Bryan, affirmed.

The panel, however, vacated the trial court's back pay award to plaintiff. The panel based its decision, entered October 1, 1973, on the duty to mitigate damages, and construed that duty to require acceptance of a demotion. 485

232. A petition for rehearing, with suggestion for ring *en banc*, has been filed by the plaintiff. This on is being held in abeyance pending resolution of ertified question.

The Certificate indicates that a majority of judges gular active service voted against rehearing the *Moody* r *en banc*, but that with the inclusion of the votes of wo senior judges who sat on the panel, a majority of otes were counted in favor of rehearing *en banc*. (A. The Certificate further indicates that if the *en banc* reaches the merits, it will probably modify the panel's ion regarding back pay (*Id.*). With respect to *ams*, the Certificate states that a majority of the judges gular active service favor granting a rehearing *en* but if the vote of the Senior Judge who sat on the is counted the *en banc* rehearing will be denied by an division of the judges (A. 1-2). The Court of als has not ruled on the suggestion for rehearing *en* pending resolution of the certified question (*Id.*).

facts or merits of the two cases are in no way in- l in the resolution of the issue framed by the Certifi- It is nevertheless apparent that the Fourth Circuit's tion of the back pay issue in both cases will turn on swer to the certified question (A. 1).[2]

---

ations in this form are to pages of Brief Appendix A. Cita- n the form "B. —" are to Brief Appendix B.

the question is answered in the negative, the *Moody* panel n would apparently stand, since the *en banc* Court would een improperly convened; and in *Williams* the district decision would probably be affirmed by an equally divided e Court. If the question is answered in the affirmative, or urth Circuit's custom allowed to apply, the *Moody* panel n would be modified and the *Williams* panel decision would

ARGUMENT

Senior Circuit Judges, Although They May Sit On An Initial Hearing Panel, Are Not Entitled To Vote On The Determination Of Whether A Case Should Be Heard *En Banc*.

I.

The Language and Legislative History of the Applicable Provisions Exclude Senior Judges From Voting.

Section 46(c) of the Judicial Code, Title 28 U.S.C., controls the practice here in question. On its face, the first sentence of 28 U.S.C. §46(c) states that only "circuit judges of the circuit who are in regular active service" are competent to vote on a suggestion of rehearing *en banc*. Congress did not, however, simply fail to turn its attention to the role of Senior Judges in *en banc* proceedings. The third sentence of §46(c), concerning participation on rehearing *en banc once the rehearing has been granted*, specifically provides for inclusion of a "circuit judge of the circuit who has retired from regular active service . . . [who] sat in the court at the original hearing thereof." Other than the power to participate once rehearing has been ordered, the statute gives no other power to Senior Judges.

The legislative history of §46(c) supports this plain reading of the statutory language. The present Section is the result of a 1963 amendment of the previous provision, which dated from the 1948 revision of the Judicial Code. The 1948 statute had clarified the Courts of Appeals' power to constitute themselves *en banc*, by legislatively adopting *Textile Mills Security Corp.* v. *Commissioner*, 314 U.S. 326 (1941). It did not explicitly address the question of

e role of Senior Judges upon rehearing. A decision of is Court thereafter construed §46(c), as it then read, to eclude the participation of Senior Judges as part of e Court *en banc*, once rehearing *en banc* had been or- red, even where the Judge had been a member of the itial panel (and had retired following the panel decision). *nited States* v. *American-Foreign Steamship Corp.*, 363 S. 685 (1960).[3] In that opinion, this Court openly invited ngress to change that result legislatively, 363 U.S. at 0-691. In 1963, Congress enacted P.L. 88-176, 77 Stat. 1, "Judges—Status After Retirement", "An Act to clarify e status of circuit and district judges retired from gular active service". The enactment amended, *inter a*, §46(c), modifying slightly its then-existing two sen- nces, and adding a third which changed the *American- reign* result by providing for participation of Senior dges of the Circuit who had sat on the panel, once the *banc* rehearing is ordered.

It is significant that Congress examined and slightly drafted the first sentence, which states the conditions on which *en banc* rehearings may be ordered, without

---

[3] In *American-Foreign*, this Court held squarely that where a ermination was committed by law to a majority of active judges, enior Judge might not participate in it, whether or not he had n a member of the panel. While the precise ruling of that case hat such a Senior Judge could not vote in rendering an *en banc* ision once rehearing by the full court had been ordered—has n changed by Congress, there has been no similar legislative nge in the provision applicable to the question certified herein. leed, the commitment, to active judges only, of the power to ide whether to have an *en banc* hearing or rehearing has been ffirmed by Rule 35, Federal Rules of Appellate Procedure 967). See p. 9, *infra*. *American-Foreign* is clear authority t where the law prescribes "active judges", Senior Judges may participate—and that is precisely the question raised by the rtificate herein.

mentioning Senior Judges.[4] The purpose of the 1963 amendment of §46(c) was *only* to "permit such a [Senior] Judge to sit on a rehearing *en banc* of a case where he participated at the original hearing thereof," and specifically to reverse *American-Foreign*. S. Rep. No. 596, 88th Cong., 1st Sess.; H.R. Rep. No. 95, 88th Cong., 1st Sess. (1963), reprinted in U.S. Code, Cong. & Administrative News, 88th Cong., 1st Session, pp. 1105-1106.[5]

The purpose of P. L. 88-176 was not to effect a general reform of judicial practice regarding rehearings *en banc*, but to clarify the status of Senior Judges. Other sections dealt with such matters as the exclusion of Senior Judges from participation in the appointment of officers of the court, promulgation of rules of the court, and membership in the judicial conference of the circuit. See S. Rep. No. 596, H.R. Rep. No. 95, *supra*. Clearly, the Congressional intent was to delineate specifically what functions Senior Judges might and might not perform. In this context, the express language limiting voting on whether to order an *en banc* hearing to judges "in regular active service", but permitting Senior Judges of the circuit who had sat

[4] Indeed, the change in language from "active service" to "regular active service" was apparently intended to remove an ambiguity as to whether a Senior Judge might still be regarded as "active". See the letter from the Administrative Office of the U.S. Courts, included in the committee reports recommending adoption of P. L. 88-176, quoted in U.S. Code Cong. & Administrative News, 88th Cong., 1st Sess., p. 1107. The additional word made clear that irrespective of their service on panels, Senior Judges were not to be regarded as "active judges" and therefore not to be included among those who could vote on whether to rehear a case *en banc*.

[5] The same Senate-House report quoted here continues, shortly after the cited passage:

> It is believed that [a] Judge who has sat on an issue in an appellate hearing *on which a rehearing has been ordered* should be a member of the court for rehearing purposes. (Id.) (emphasis supplied)

on the panel to participate in the decision if an *en banc* hearing was ordered, reflects a line carefully drawn by Congress.

The text of Rule 35, Federal Rules of Appellate Procedure, points with equal clarity to the same conclusion.[6] Rule 35(a) provides for *en banc* sittings only when a "majority of the circuit judges who are in regular active service" so order. Rule 35(b) directs that the clerk, upon receipt of a party's suggestion of a rehearing *en banc*, "shall transmit any such suggestion to the judges of the court who are in regular active service". The framers of the Rule clearly intended thereby not to authorize Senior Judges from the panel to vote on the question of whether to convene an *en banc* court. This becomes plain from the next sentence of Rule 35(b), which specifically allows Senior [or other] Judges who sat on the panel to request a vote on a party's suggestion of *en banc* consideration. Similarly, the Advisory Committee's Note to Rule 35 states that

> The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings *en banc*, and provides that suggestions will be directed to judges of the court in regular active service.

3 F.R.D. 61, 153 (1967).

All the statutory provisions point to the same result: Senior Judges may not participate in the determination of whether a case will be heard or reheard *en banc*.

---

[6] Rule 35, like the other Federal Rules of Appellate Procedure, was not designed to modify or amend the substance of underlying legislation such as §46(c), but to implement it.

II.

Compelling Policy Reasons Deriving From The Purpose And Nature Of *En Banc* Hearings, The Status Of Senior Judges, And The Need For Consistent Appellate Practice Support The Plain Language Of The Statute And Rule.

1. The Purpose Of *En Banc* Hearings and the Status of Senior Judges.

Sound judicial policy dictates a negative answer to the certified question. The principal purpose of providing for *en banc* rehearing of panel decisions is to assure consistency of the law within a circuit, or as this Court has put it,

> To enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions.

United States v. *American-Foreign Steamship Corp., supra,* 363 U.S. at 689-690. This purpose is not served, and may well be hindered, by allowing Senior Judges to participate in the determination of when a panel decision is so out of line with the views of the majority of the Court responsible for its "integrity as an institution"—the active members of the Court—that review by the whole court becomes necessary.[7]

---

[7] In *American-Foreign* the Court wrote that "Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of *en banc* decision to the permanent active membership of a Court of Appeals," 363 U.S. at 689. As shown at pp. 6-8 *supra*, nothing in the text or legislative history of the 1963 amendment to §46(c) indicates that Congress had changed its mind, with respect to the narrow issue posed by the present Certificate.

The ongoing general responsibility for the judicial work of the circuit is vested in the active judges.[8] They have the continuing duty to develop and apply the law in cases that will be adjudicated in the future. This Court in *American-Foreign* described active judges as being "those charged with the administration and development of the law", 363 U.S. at 689, and recognized approvingly that

> the evident policy of the statute [old §46] was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court. . . .' 363 U.S. at 690

(quoting opinion in same case below, 265 F.2d 136, 155 (2nd Cir. 1957). Circuit judges in regular active service also are most directly aware of the problems of calendar congestion in the circuit, and are in the best position to balance the burdens imposed on the time of additional judges by an *en banc* hearing against the advantages of establishing a clear and uniform rule for the circuit.[9]

In contrast, retired Circuit Judges do not exercise the same continuing responsibility for the work of the Court as a whole.[10] The rationale for retired judges' participation

---

[8] 28 U.S.C. §43(b) states flatly, "Each Court of Appeals shall consist of the circuit judges of the circuit in regular active service." In contrast, §43(b) provides that Senior Circuit Judges may participate to a limited extent in the work of the circuit: "[t]he circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court."

[9] See also Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U.L. REV. 562, 574 *et seq.* (1965).

[10] See n. 8, *supra*. Senior Judges sit pursuant to 28 U.S.C. §43(b) only when "designated or assigned". A retired judge may be "designated and assigned" by the Chief Judge of the Circuit to perform such duties as he is willing and able to undertake" pursuant to 28 U.S.C. §294(c). Section 294(c) provides, "No retired justice or judge shall perform judicial duties except when

at *en banc* rehearings of causes in which they sat on the panel is significantly different from the rationale for the *en banc* proceeding as a whole. Chief Judge Brown of the Fifth Circuit has articulated the principal reason as "the benefit which the entire Court obtains from the prior work, research, study and deliberation done by a Senior Judge during his (and his two colleagues') initial consideration of the case." *Allen* v. *Johnson*, 391 F.2d 527, 531 (5th Cir. 1968); see also *id.* at 529. This rationale, however, comes fully into play only after the decision to convene *en banc* has been made, when the whole court addresses the merits of the case before it with full deliberation.[11]

There is no general policy to the effect that all judges who participate in a panel decision of a court of appeals are necessarily to play a part in either the vote on whether to order a rehearing *en banc* or the decision if such a rehearing is ordered. Court of Appeals panels often include district judges, circuit judges from other circuits, and retired Supreme Court Justices, none of whom are authorized to play any further role in connection with any subsequent *en banc* action. Thus, participation on a panel

---

designated and assigned." From this statutory scheme, it is apparent that Senior Judges of the Circuit are not regarded as members of the court generally, but have a separate, limited status. See also 28 U.S.C. §295 (assignment and designation of Senior Judges to sit may be revoked).

[11] Moreover, the advantages to be drawn from a Senior Judge's deliberations while on the panel are not cast away by his nonparticipation in the vote whether to convene the court *en banc*. Section 46(c) nowhere limits, and Rule 35 specifically recognizes, the authority of Senior Judges to recommend *en banc* proceedings or to call for a vote of the active judges on such a suggestion. In fact, the practice of most circuits appears explicitly to confer this power on Senior Judges who were panel members. See Brief Appendix B.

And of course, a Senior Judge who sat on the panel will always participate in the vote on a petition for rehearing by the panel.

should not itself entitle a judge to participate in all further proceedings on the case.[12]

2. The Policy of Uniformity.

The certified question is of general importance and nationwide applicability.[13] Congress has approved a statute, 28 U.S.C. §46(c), and this Court has promulgated a Rule, F.R.A.P. Rule 35, which are national in scope and call for uniform application.[14] The basic issue as to the composition of the Courts of Appeals in voting whether to constitute themselves *en banc* should not be left to the accidents of local custom or even, conceivably, to ad-hoc determination by a succession of courts of changing com-

[12] Differentiation between the judges designated to decide whether a case is to be reviewed and the judges who decide on the merits after review is granted is not uncommon in federal judicial practice. One example is the requirement of 28 U.S.C. §1292(b) that the recommendation of the district judge making an interlocutory order not otherwise appealable is a prerequisite to the discretionary power of the court of appeals to hear the appeal. Another is the procedure required by 28 U.S.C. §2284 in proceedings for an injunction against operation of a state statute. A single district judge initially determines whether the action requires a three-judge district court, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); but once that judge so rules, the Chief Judge of the circuit must designate the two other judges to sit on the district court. 28 U.S.C. §2284(1). And in many state judicial systems, a lower court may grant leave to appeal to a higher court.

[13] As the Certificate recites, "Were the answer to the question in each case of importance to the litigants only, the judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it. . . . The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake." (A. 2)

[14] Indeed, these provisions have been applied uniformly by the different Circuits—with the single exception of the Fourth. See pp. 14-15, *infra*.

position.[14] Uniformity of procedure in the appellate courts on this point is both intended and desirable.

The Fourth Circuit's local custom of allowing Senior Judges who sat on the panel to participate in the determination whether to hear the case *en banc* is inconsistent with the practice of all the other circuits.[16] The First,[17]

---

[15] The line of decisions by this Court holding that the Courts of Appeals should have authority to formulate and administer their own procedural rules concerning rehearings *en banc* does not imply otherwise. See, e.g., *Western Pacific Railway Corp.* v. *Western Pacific Railway Co.*, 345 U.S. 247 (1952); *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685 (1960); *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963). The *Western Pacific* decision, which fathered the line, specifically dealt with the purely "house-keeping" functions of the Court of Appeals, 345 U.S. at 255-256. The Court there expressly stated that "the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges. . . ." 345 U.S. at 261. That case and the following decision in *Shenker* revolved essentially around the purely procedural question of whether a litigant can dictate to an appellate court what method it shall use to determine whether a majority of active judges desire *en banc* consideration. (Specifically, the question was whether each active judge of the court was required to vote on the suggestion for *en banc* consideration.) The Court concluded that the administrative machinery for determining whether a majority of the active judges of the court favored an *en banc* hearing was the appeals courts' own "house-keeping" business, as the 1948 Judicial Code Reviser had contemplated. It nowhere questioned the assumption that the majority involved was of active circuit judges only. The *American-Foreign* case had nothing to do with the issue as to how an *en banc* hearing may be convened; it dealt only with the competency of a retired judge to sit on the rehearing *en banc* on the merits of the case. 363 U.S. at 688. Moreover, the result in *American-Foreign* was specifically overruled by Congress in the 1963 amendment to 28 U.S.C. §46(c).

[16] Brief Appendix B summarizes the responses of the Courts of Appeals to a polling by the undersigned counsel with respect to their practice regarding the certified question. In some instances the responses merely set forth answers given to counsel for Albemarle Paper Company who apparently conducted a similar survey.

[17] See First Circuit Local Rule 16, particularly 16(e) (B. 1).

Second,[18] Third,[19] Fifth,[20] Seventh,[21] Eighth,[22] Ninth,[23] and District of Columbia[24] Circuits each follow a rule or practice of not permitting Senior Judges to vote on this question. The Sixth[25] and Tenth[26] Circuits have never had occasion to consider the question and therefore have no established practice. No other Circuit follows the Fourth Circuit's interpretation of §46(c) and Rule 35.

Since eight other circuits have determined that section 46(c) and Rule 35 preclude the practice followed by the Fourth Circuit,[27] this Court can serve the goal of uniformity of practice as well as the intent of Congress by answering

---

[18] *See* letter from Chief Deputy Clerk of the Second Circuit dated January 31, 1974 (B. 1), and *see Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1040-1041 (2nd Cir. 1973) (on petition for rehearing *en banc*), aff'd on merits 94 S.Ct. 505 (December 17, 1973).

[19] *See* letter from Chief Deputy Clerk of the Third Circuit, dated January 31, 1974; and *see* Local Rule 2(3) (B. 2).

[20] *See* letter from Chief Deputy Clerk of the Fifth Circuit, dated January 31, 1974 (B. 2-3); and *see Allen* v. *Johnson*, 391 F.2d 527, 532 (1968).

[21] *See* letter from Clerk of the Seventh Circuit, dated February 6, 1974 (B. 4).

[22] *See* Eighth Circuit Local Rule 7, adopted effective July 1, 1973 (B. 4).

[23] *See* Ninth Circuit General Order No. 15 and letter from Hon. Albert T. Goodwin (B. 4-5).

[24] *See* letter from Clerk of the District of Columbia Circuit, dated January 25, 1974 (B. 5).

[25] *See* letter from Clerk of the Sixth Circuit, dated January 29, 1974 (B. 4).

[26] Advice by telephone call from Clerk of Tenth Circuit to office of undersigned counsel, February 11, 1974.

[27] Indeed, the Certificate indicates that the practice of the Fourth Circuit may not have been premised upon full deliberation. Its "custom", although "thought reasonable", apparently had not been subject to a "close examination" of §46(c) and Rule 35 (A. 2).

the certified question in the negative. The Federal Rules of Appellate Procedure adopted by this Court require such an answer.[28]

For the reasons summarized above, it is clear that the Fourth Circuit's custom contravenes sound policies as to the nature of the *en banc* process and the distinction between active and retired judges, as well as the policy of consistency in appellate practice.[29]

---

[28] While the Fourth Circuit's informal "custom" has not been specifically included in its own rules, it should be noted that Rule 47 of the Federal Rules of Appellate Procedure permits local rules "not inconsistent with these rules". The Fourth Circuit practice is clearly inconsistent with Rule 35. If it could not validly be embodied in a formal rule, it can scarcely be permitted to stand as an informal practice.

[29] But even if the Fourth Circuit's practice were desirable, it would be contrary to present law. This Court has indicated that change, if any, must come by statute, when it upheld the plain meaning of the old, flawed §46(c) as being correct although not desirable in *United States* v. *American-Foreign Steamship Corp.*, *supra*, at 490-491. (After that decision, Congress addressed and resolved the problem in an appropriate manner, see pp. 7-8 *supra*.) Likewise, the dissenters in *Zahn* v. *International Paper Co.*, *supra*, n. 18, while not disputing what present §46(c) means and vigorously expressing their dissatisfaction with that meaning, joined the prevailing judges in calling for Congressional review of what the latter described as "its apparent inconsistency," 469 F.2d 1041, 1042 n.1.

CONCLUSION

The Fourth Circuit's practice is not reconcilable with Rule 35 of the Federal Rules of Appellate Procedure or with 28 U.S.C. §46(c), its history or purpose. This Court should therefore answer the certified question in the negative.

Respectfully submitted,

J. LeVonne Chambers
Robert Belton
East Independence Plaza
951 S. Independence Boulevard
Charlotte, North Carolina 28202

Jack Greenberg
James M. Nabrit, III
Norman J. Chachkin
Morris J. Baller
Barry L. Goldstein
Joseph P. Hudson
10 Columbus Circle
Suite 2030
New York, New York 10019

Conrad O. Pearson
203½ E. Chapel Hill Street
Durham, North Carolina

Thomas T. Clayton
307 W. Franklin Street
Warrenton, North Carolina

Attorneys for Moody, et al., and Williams, et al.

Of Counsel

Albert J. Rosenthal
435 West 116th Street
New York, New York 10025

APPENDIX

APPENDIX A

Certificate of the United States Court of Appeals for the Fourth Circuit

[caption omitted]

CERTIFICATE

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28 U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

> Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?

The question is of determinative importance in each of the cases.

In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay.

In *Williams*, one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc*, he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the

suggestion will fail by an equal division of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose. The panel had reversed an award of damages by the district court, but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal, probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges who were members of the initial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-42, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *The Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

s/ CLEMENT F. HAYNSWORTH
Chief Judge, Fourth Judicial Circuit

APPENDIX B

Results of Survey of Practices in the Various Circuits

First Circuit:

RULE 16. PETITION FOR EN BANC CONSIDERATION

Supplementing FRAP Rule 35, the following requirements shall apply:

(a) Each application shall be submitted, with six copies.

(b) No application will be received until the case has been determined by a three-judge panel.

(c) No application will be granted if the panel's decision is unanimous, regardless of the number of opinions filed.

(d) No application will be granted unless one of the judges on the panel approves.

(e) If application is granted, a senior judge will sit if, but only if, he was on the panel.

(f) If the application is granted, the ultimate decision will be that of the majority of the active judges.

Second Circuit:

—— [Letterhead and inside address omitted]

January 31, 1974

Dear Sir:

In reply to the request contained in yours of January 29, 1974 received today, the practice in this court is not to permit the senior Circuit Judges who were members of the initial hearing panel to vote when the court is polled on the question of granting an in banc hearing.

The practice in this court is as Judge Mansfield stated in his concurring opinion in Zahn v. International Papers Company, 469 F.2d 1033, 1041, ". . . that a senior judge who heard an appeal as a panel member may not participate in ordering it to be heard in banc. . . . ."

Sincerely yours,

A. Daniel Fusaro
Clerk

/s/ VINCENT A. CARLIN
by Vincent A. Carlin
Chief Deputy Clerk

Third Circuit:

Rule 2 (3)

COURT AND DIVISIONS—NUMBER OF JUDGES TO SIT—COURT IN BANC. Cases and controversies are heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges in regular active service. The court in banc consists of all the circuit judges in regular active service. A senior circuit judge of the circuit is competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

[Letterhead and inside address omitted]

January 31, 1974

Dear Mr. Mittelman:

Your letter of January 29, 1974, to Mr. Quinn has been received during his absence from the office today. However, since he just answered a similar question for an attorney in Richmond, Virginia, I am forwarding you his statement in that letter which was as follows:

"In this Court, the only votes counted where the question of rehearing en banc is presented to the Court are the votes of active circuit judges. Senior judges do not vote on the question of rehearing en banc."

Very truly yours,

/s/ M. ELIZABETH FERGUSON
M. Elizabeth Ferguson,
Chief Deputy Clerk

Fifth Circuit:

[Letterhead and inside address omitted]

January 31, 1974

En Banc Rehearings

Dear Mr. Mittelman:

Responding to the inquiry contained in your letter of January 29, 1974 as to the practice of this Court of participation by Senior Circuit Judges of the Circuit in polls on the question of granting an en banc rehearing, I am authorized by

the Chief Judge to advise that the practice in the Fifth Circuit is that only active Judges of the Circuit participate in the poll. However, if the case is put en banc, and a Senior Judge of this Circuit sat as a member of the hearing panel he would participate in the consideration of the case en banc.

Sincerely yours,

EDWARD W. WADSWORTH
CLERK

By /s/ GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

th Circuit:

[Letterhead and inside address omitted]

January 29, 1974

Re: En Banc Rehearings

Dear Mr. Lowden:

This is in response to your letter of January 21, 1974, regarding the practice in this court in considering suggestions for rehearing en banc in cases on which a Senior Circuit Judge was a member of the original hearing panel. As I understand your inquiry, you are specifically interested in whether or not a Senior Circuit Judge who is a member of the original hearing panel is entitled to vote in the determination of the question whether or not the case should be reheard en banc.

As I am sure you have already determined, the Sixth Circuit has no rule regarding this question. Moreover, insofar as I am able to determine, the question of whether a Senior Circuit Judge who was a member of the initial hearing panel is entitled to vote in the determination of the question whether or not the case should be reheard en banc has never been presented to or decided by the court. Accordingly, I would have no basis for making any representation concerning the court's practice in this regard.

Very truly yours,

/s/ JAMES A. HIGGINS
James A. Higgins, Clerk

Seventh Circuit:

[Letterhead and inside address omitted]

February 6, 1974

Dear Mr. Mittelman:

In our Court the Senior Circuit Judge who was a member of the initial hearing panel may request that a vote be taken on a party's suggestion that a rehearing be had *in banc*. However, such Senior Circuit Judge may not participate in such a vote if and when one is taken.

I know I answered this same question for another attorney in the *Moody* case about two weeks ago. I cannot remember his name, but it could be your opposing counsel.

Very truly yours,

/s/ THOMAS F. STRUBBE
Thomas F. Strubbe
Clerk

Eighth Circuit:

RULE 7. HEARING AND REHEARING IN BANC. A party or a judge of this court in regular active service may suggest that a case or controversy be heard or reheard in banc. A majority of the judges of this court in regular active service who are actively participating in the affairs of the court and are not disqualified in the particular case or controversy may order a hearing or rehearing in banc. The panel for the hearing or rehearing consists of the judges of this court in regular active service who are actively participating in the affairs of the court at the time of the hearing or rehearing and are not disqualified in the particular case or controversy and the senior circuit judges of this circuit who sat at the original hearing thereof unless the senior circuit judges elect not to sit at the rehearing in banc.

Ninth Circuit:

Practice in the Ninth Circuit is governed by General Order No. 15—*In Banc Hearings*. This document, which is not a published local rule, is lengthy and, to the undersigned counsel, somewhat unclear on the point in question here. It does provide, in part—

"2. *Panel recommendations for a rehearing in banc.*

Should the panel to which a case has been assigned determine, *sua sponte*, or upon consideration of a suggestion by

a party or of a member of the Court, or of a member of the panel, that the case should be reheard in banc or that the members of the court in active service should decide whether the case should be so reheard, it shall:

(1) send a memorandum to the Chief Judge so advising him, indicating why this course is appropriate, and should provide him with a sufficient number of copies so that the Chief Judge may distribute the memorandum to all members of the Court in active service; . . ."

Because this and other provisions of the General Order do not indicate with certainty what the Ninth Circuit's practice is, the office of the undersigned counsel requested clarification by the Honorable Albert T. Goodwin, Circuit Judge and In Banc Expediter of the Ninth Circuit. Judge Goodwin sent the following letter:

[letterhead and inside address omitted]

February 8, 1974

Dear Mr. Mittelman:

The practice of the Ninth Circuit is to allow Senior Judges who sat on the original panel to request a rehearing in banc. The vote on granting a rehearing is limited to the judges in active service. If a rehearing is granted, a Senior Judge who sat on the panel of decision is entitled to sit with the court in banc and to record his vote, 28 U.S.C. §46(c), Gen. Order 15, Ninth Circuit Internal Operating Orders.

Yours very truly,

/s/ ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge

Tenth Circuit:

[No written response to this polling.]

District of Columbia Circuit:

[Letterhead and inside address omitted]

January 25, 1974

In Re: En Banc Rehearings

Dear Mr. Lowden:

Reference is made to your letter of January 21, 1974 inquiring into this Court's procedure with respect to suggestions for rehearing *en banc*.

The practice followed by this Court is that a Senior Circuit Judge of this Court, if he was a member of the original three-judge panel, may call for a vote with respect to a suggestion for rehearing *en banc*, but he can not vote thereon. In the event a majority of the Judges of this Court in active service vote for rehearing *en banc*, the Senior Circuit Judge can participate in the case with the *en banc* Court.

Sincerely yours,

/s/ H. KLINE
Hugh E. Kline
Clerk

MOODY ET AL. *v.* ALBEMARLE PAPER CO. ET AL.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-899. Decided June 17, 1974

Although 28 U. S. C. § 46 (c) provides that a retired circuit judge may sit on an in banc court rehearing a case in which he participated at the original hearing, only regular active service circuit judges are vested with authority to vote whether to rehear a case in banc.

PER CURIAM.

Appeals from the judgments of the trial courts in two cases were heard and determined by two separate three-judge divisions of the Court of Appeals for the Fourth Circuit. Sitting by designation as members of each of the divisions were senior judges of the Fourth Circuit.[1] Following decisions by both divisions, the unsuccessful parties petitioned for rehearings in banc pursuant to 28 U. S. C. § 46 (c):[2]

"Cases and controversies shall be heard and deter-

---

[1] The Court of Appeals for the Fourth Circuit is composed of seven judges in regular active service, 28 U. S. C. § 44, and two judges who have retired from that service but remain available for duties as designated and assigned, known as senior judges, 28 U. S. C. § 294 (b). In *Moody* v. *Albemarle Paper Co.*, both of those senior judges were designated members of the three-judge division which originally decided that appeal, see 474 F. 2d 134; in *Williams* v. *Albemarle City Board of Education*, one of the senior judges was so designated, see 485 F. 2d 232; 28 U. S. C. § 294 (c).

[2] Fed. Rule App. Proc. 35 provides in part:

"(a) *When Hearing or Rehearing in Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when con-

mined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit *who are in regular active service.* A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." (Emphasis added.)

It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate 3. Here, their votes are crucial. In *Moody*, while a "majority of the circuit judges of the circuit who are in regular active service" did not vote for a rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing. In *Williams*, while a majority of Circuit Judges in regular active service did vote for a rehearing in banc, the senior judge who sat on the original division by designation

---

sideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) *Suggestion of a Party for Hearing or Rehearing in Banc.* A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

voted against rehearing; with his vote counted the rehearing would fail by an equal division of those voting.

Accordingly, all Circuit Judges of the Fourth Circuit in regular active service and both senior judges of the Circuit have, pursuant to 28 U. S. C. § 1254 (3), certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc. Because of the importance of the question to the administration of judicial business in the circuits, as well as to the parties in the two cases pending in the Fourth Circuit, we granted leave to and invited those parties to file briefs in response to the question certified. Upon consideration of the question and the briefs filed by the litigants on both sides of both pending cases, we conclude that the answer should be in the negative; senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc.

The power of courts of appeals to hear or rehear cases in banc was first determined in *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326 (1941). In 1948, Congress provided legislative ratification of *Textile Mills* by enacting § 46 (c) of the Judicial Code, which then provided that hearings or rehearings before courts of appeals in banc were to be

> "ordered by a majority of the circuit judges of the circuit *who are in active service.* A court in banc shall consist of all active circuit judges of the circuit." 28 U. S. C. § 46 (c) (1952 ed.). (Emphasis added.)

In the *Western Pacific Railroad Case*, 345 U. S. 247 (1953), the Court had occasion to construe the 1948 statute, and determined that it was a grant of

wer to the courts of appeals to order hearings or rehear-
gs in banc, not the creation of a right in litigants to
mpel such hearings or rehearings or even to compel the
urt to vote on the question of hearing or rehearing.
ie Court also addressed itself to the procedure govern-
g the exercise of this power, holding that each court
appeals was "left free to devise its own administrative
achinery to provide the means whereby a majority may
der such a hearing."[3] *Id.*, at 250. This discre-
on has been subsequently confirmed. *Shenker* v. *Balti-
ore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); *United States
American-Foreign S. S. Corp.*, 363 U. S. 685, 688
960).

In one of these latter cases, *American-Foreign*, a ques-
on arose under the language of the 1948 statute
nether, if rehearing in banc was voted, senior judges
ere eligible to participate in the decision of that case
the merits. The Court held that senior judges
ere not eligible to sit. Congress in 1963 then enacted
e present version of § 46 (c), which provides that a
nior judge who sat on the original division hearing a
se is "competent *to sit* as a judge of the court in banc"
the merits rehearing of the case. (Emphasis added.)

[3] The machinery devised by the Ninth Circuit in that case was
e which governed the initiation of the polling of the court to
termine whether it should hear or rehear a case in banc. Although
ere was some uncertainty whether indeed the Ninth Circuit had
ovided such machinery, 345 U. S. 247, 263, its nature was to
legate to the three-judge division first hearing the case the power
initiate a poll of the court. *Id.*, at 259. Two of the judges who
ere members of the division in that case were district judges.
., at 263. This machinery was similar in kind to that now set
rth in Fed. Rule App. Proc. 35 (b), *supra*, n. 2, by which a vote
hear or rehear a case in banc will not be taken unless such a
te is requested by a judge in regular active service, or a judge
o was a member of the division that rendered a decision sought
be reheard.

But the language of the statute concerning how the court *orders* a rehearing in banc was not changed, except to reinforce the limitation on the grant of power by adding "regular" before "active service," sharpening the definition of which judges may participate in ordering a hearing or rehearing in banc.

The language of the present statute thus confines the power to order a rehearing in banc to those circuit judges who are in "regular active service." Although, as the Court has held, those judges are largely free to devise whatever procedures they choose to initiate the process of decision to order such a rehearing, and to decide who may participate in those preliminary procedures, see n. 3, *supra*, neither the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc. Obviously such a decision can be reached only by voting. As revealed by the decisional and statutory evolution of the institution of the in banc court, the eligibility of senior judges for participation therein has been the exception, not the rule. We are not at liberty to engraft upon the statute a meaning inconsistent with its historical limitations.

Indeed, the very purpose of the in banc court supports our conclusion that senior judges have not been authorized by implication to participate in ordering a hearing or rehearing in banc. As the Federal Rule indicates, *supra*, n. 2, the in banc court is normally reserved for questions of exceptional importance, or to secure or maintain uniformity of decision within the circuit. In the wise use of this exceptional power to " 'determine the major doctrinal trends of the future' " for a particular circuit, *American-Foreign*, 363 U. S., at 690, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other

things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future workload. Senior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments "without economic incentive of any kind." *Id.*, at 688 n. 4. Consistent therewith, Congress has provided that when a senior judge has participated in the original division hearing, such senior judge may later sit on an in banc court rehearing that case; this was the purpose of the 1963 amendment to the Judicial Code. But voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration. Congress vested this latter authority and responsibility exclusively in "circuit judges of the circuit who are in regular active service," 28 U. S. C. § 46 (c); because of their different nature, we cannot assume the grant of authority to do one includes authority to do the other.

The question certified to us is therefore answered in the negative.*

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

---

* The only other courts of appeals which have discussed the issue have ruled similarly. *Zahn* v. *International Paper Co.*, 469 F. 2d 1033, 1040–1042 (CA2 1972) (statements and dissent upon denial of rehearing in banc); *Allen* v. *Johnson*, 391 F. 2d 527, 532 (CA5 1968) (in banc).